

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

VOLUME 9 (A.M. portion)

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1 NOTE: The December 15, 2015 portion of the case
2 begins in the absence of the jury as follows:

3 JURY OUT

4 THE COURT: All right. Good morning. I see everyone
5 is here. I hope you had a good weekend and a good Monday.

6 I appreciate the work that you did on the jury
7 instructions. I got back here last evening and went through
8 them.

9 I'll tell you, generally I stuck to the O'Malley
10 instructions to the extent that I could, including using their
11 instructions on direct and contributory and vicarious
12 liability.

13 I have fashioned some instructions on some of the
14 unique parts of the case regarding spoliation and instructions
15 on the legal arguments, so I will have those for you later
16 today.

17 I'm not sure what your -- what you would like to
18 accomplish in the next couple of minutes. I'm still struggling
19 a little bit with the mitigation instruction, the statutory
20 damages instruction as to whether I should put in the
21 deterrence and penalty language in that statutory damages
22 figure.

23 So I will hear anything you would like to say on
24 that, and anything else you want to tell me this morning based
25 on the briefs that you submitted.

1 And I will give you an opportunity after I get the
2 package to you today to make further final argument and make
3 exceptions to my instructions.

4 All right.

5 MR. PECAU: Your Honor --

6 THE COURT: Yes, sir.

7 MR. PECAU: -- I just want to make a quick
8 preliminary statement with regard to the -- Cox's approach to
9 this that raises great concern for us.

10 If you look, for example, at their memorandum, what
11 they're-- and particularly, for example, just page 3. What
12 they are constantly rearguing and what they want to argue to
13 the jury is contrary to your judge's order in your summary
14 judgment memorandum and opinion. And this causes us great
15 concern that they are going to --

16 THE COURT: Well, what's the specific --

17 MR. PECAU: Okay. For example, Your Honor, if you
18 look at page 3, Cox states, "plaintiffs have not submitted any
19 evidence of an actual upload by a user of the Cox Internet
20 service to another Internet user."

21 This is precisely the same argument they keep
22 bringing up over and over again, and precisely the same
23 argument Your Honor has found as a matter of law has no
24 validity.

25 So what they're basically saying is everything

1 Rightscorp has done, the jury should disregard.

2 THE COURT: Okay. I have ruled on that and I have
3 ruled -- I have fashioned the instructions so that that burden
4 is not on BMG.

5 What else would you like to talk about?

6 MR. PECAU: All right. So our concern is that they
7 are going to try to in their closing argument make these same
8 kinds of arguments. Again, you see it all the way through -- I
9 can point out a number of other instances. And we don't want
10 to be jumping every time they do this in their closing
11 argument.

12 So that was the one concern I wanted to bring to Your
13 Honor's attention.

14 THE COURT: Okay. Mr. Bridges.

15 MR. BRIDGES: Your Honor, I will respond, and I am
16 going to not respond to the sort of process criticism that
17 opposing counsel voiced because I don't think it is useful.

18 The context of this is that they want an instruction
19 specifically about an inference from making available. We
20 understand the Court's position --

21 THE COURT: I am not giving them the making available
22 instruction. I have ruled it wasn't -- I don't believe that
23 Hotaling was good law, and I am not giving it. I cut it out of
24 the instructions. So it's not part of the case.

25 MR. BRIDGES: Sorry. My only other comment on that

1 is that the Court generally gives an instruction in general
2 about circumstantial evidence. That instruction alone would be
3 appropriate rather than some specific instruction on this.

4 I am sorry, Your Honor. One thing I wasn't clear on
5 what you said earlier about occasion to make exceptions to the
6 jury instructions.

7 THE COURT: Yeah. I will pull the final package
8 together. I think your idea that we instruct the jury today
9 and have closing arguments tomorrow is a good one, as long as
10 we are still going to have the four witnesses and it is going
11 to take up at least the morning.

12 So once you get the final instructions, I will give
13 you a chance to put on the record any criticisms and/or
14 suggestions. And so, we will deal with it one more time later
15 in the day after you see what I have done to the fine work that
16 you all did on coming up with instructions that assist you in
17 your advocacy.

18 MR. BRIDGES: Thank you, Your Honor. In that case, I
19 don't think -- unless the Court has questions, I don't think we
20 need to burden the Court's time.

21 THE COURT: Well, the innocent infringement, where
22 does that fit?

23 MR. BRIDGES: It fits, Your Honor -- it's up to the
24 jury to decide the range of statutory damages that applies.
25 They have cited one case that implies that innocent infringer

1 status is not available here. That case actually specifically
2 pertains to a separate section of the Copyright Act saying that
3 omission of a copyright notice has an effect on innocent
4 infringement, and the M. Kramer case they cited bears on that
5 and it does not bear on the general determination of innocence.

6 The question is, I think appropriate for the jury
7 here to consider, whether taking into account all of the facts
8 in the testimony and the evidence that the jury has heard they
9 believe that Cox did not intend to infringe copyright law.
10 That maybe that was a byproduct of its decision not to handle
11 these types of notices.

12 But I think it is certainly open for the jury to
13 conclude on these facts that if Cox is liable for infringement,
14 it was innocent because it didn't believe that providing an ISP
15 service with general purpose uses and getting the sorts of
16 noncompliance from Rightscorp gave it obligations.

17 This opens up the whole discussion that we don't need
18 to go into now about the role of the Sony line of cases and the
19 like on general purpose ISP services. This is not Napster.
20 This is not a flea market, like Fonovisa. This is a plain
21 vanilla and strong argument that we intend to press at every
22 opportunity, that this is non-infringing.

23 So for the jury not to hear or not to be allowed to
24 decide on the facts that even if it is infringing, it's
25 innocent, I think would be a miscarriage of justice. I think

1 they are entitled to make that decision. And if they choose
2 not to, fine. But I think they are entitled to.

3 THE COURT: Okay. All right. Let me ask you one
4 more -- do you want to respond to that, Mr. Theodore?

5 MR. THEODORE: I would like to address all the points
6 you raised, deterrence, mitigation, and innocence.

7 THE COURT: Okay. Then hold on one second.

8 I allowed testimony about what other ISPs were doing
9 with regard to these notices and that several were not
10 forwarding notices if they contained settlement language. And
11 I did that because I thought that it went to willfulness
12 because I thought that there was going to be -- or I thought
13 there was going to be testimony that Cox was aware that other
14 ISPs were not forwarding those notices to customers. And I
15 don't recall that coming into the case.

16 So I am -- what's your recollection?

17 MR. BRIDGES: Your Honor, we felt constrained --
18 Mr. Cadenhead absolutely would have testified to that, but it
19 was our understanding that the Court would not let him go
20 there. If -- I wish we could have had him go there, Your
21 Honor, because he participated personally in the Copyright
22 Alert System negotiations and learned a lot about the industry
23 in those negotiations.

24 And it was his understanding, Your Honor, that Cox
25 was the only ISP at the time to terminate people. And there

1 was, I believe, discussion with certainly CenturyLink and
2 possibly other ISPs, I don't recall specifically, about
3 Rightscorp's notices.

4 If you recall, there was the famous e-mail in this
5 case, the F the DMCA e-mail, the underlying e-mail of the whole
6 thread was CenturyLink bringing Rightscorp to Cox's attention
7 about Rightscorp's notices. Now, that e-mail was about the
8 volume of notices. But, Your Honor, we just felt -- by the
9 Court's rulings. We felt totally constrained on that front,
10 and we were trying not to get too close to the edge lest we
11 annoy the Court.

12 THE COURT: Okay. The intersection of the legal
13 opinion and his testimony may have precluded that in any event.

14 All right. So where are you now on the fact that
15 there is no testimony that Cox was aware at the time it made
16 the decision to not forward the notices with regard to what
17 other ISPs were doing?

18 MR. BRIDGES: Your Honor, we --

19 THE COURT: What use, if any, do you intend -- I
20 mean, the continued examination reflects that they're -- you
21 know, that obviously Rightscorp has signed up and gotten
22 compliance from a vast amount of the industry to include the
23 settlement in the notices, but --

24 MR. BRIDGES: Your Honor, I'm not sure the testimony
25 shows that Rightscorp has secured compliance with a vast amount

1 of the industry. If you look at the list of ISPs --

2 THE COURT: Well, he also said there were 300 others
3 that had signed up.

4 MR. BRIDGES: That's right, Your Honor. The state of
5 Maine appears twice on that list. It is not known to be a
6 great ISP. It includes small ISPs. It includes colleges as
7 ISPs. It's -- there are lots of ISPs out there, and their
8 coverage, I think, is -- at least the last statistic I saw was
9 about 15 percent or something like that. And some of them do
10 appear to edit out and maybe forward edited notices that Cox
11 believes is not appropriate to do.

12 So I think it's the wrong impression to say that it
13 has gotten the vast majority.

14 THE COURT: Well, it includes -- I guess Comcast is
15 the only other -- is the biggest one of them.

16 MR. BRIDGES: AT&T, Verizon, Cablevision --

17 THE COURT: I understand they are not right.

18 MR. BRIDGES: They are not.

19 THE COURT: As far as Rightscorp is aware. Because
20 the testimony that I heard is they -- the only way he knows
21 whether somebody is complying is if he gets a settlement offer,
22 which, you know, makes sense if you don't have a relationship
23 with the ISP.

24 MR. BRIDGES: Well, Your Honor, that -- maybe that
25 was an explanation, but we got direct answers to direct

1 questions. Does AT&T still ignore your notices? There was a
2 direct question, direct answer. That question repeated itself
3 across AT&T, Verizon, Cablevision -- I can't recall. It's in
4 the trial transcript, and it was clear in the deposition.

5 THE COURT: So you intend to use it in your closing
6 argument?

7 MR. BRIDGES: I believe we do, Your Honor.

8 THE COURT: Okay. All right.

9 MR. BRIDGES: But I think all of this goes to -- the
10 bottom line is Cox -- the jury has heard that Cox was willing
11 to process these notices if Rightscorp would just change them,
12 and it wasn't willing to act on these notices for good reason.
13 And I think based on that, a jury can certainly say that this
14 is not willful infringement by Cox. And again --

15 THE COURT: I agree that that argument is a clean
16 argument and doesn't even involve whether -- whatever third
17 parties were doing. That can be a separate consideration.

18 Okay. Thank you.

19 MR. BRIDGES: Thank you, Your Honor.

20 THE COURT: Mr. Theodore.

21 MR. THEODORE: So let me start with the innocence
22 issue since that's what you were talking about with
23 Mr. Bridges, and then I will move on to the deterrence and the
24 mitigation questions that you asked about.

25 THE COURT: All in five minutes or less.

1 MR. THEODORE: I will try to be very quick, Your
2 Honor.

3 So I think there are two critical points on the
4 innocence question. And the first is that he is conflating --
5 Mr. Bridges is leaving really no space between willful
6 infringement and innocent infringement. Almost everything
7 Mr. Bridges says goes to the difference between just normal
8 infringement and willful infringement.

9 To show innocent infringement, Your Honor, and it is
10 their burden, it is the defendants' burden to show innocent
11 infringement, you have to affirmatively show that you did not
12 know that the works themselves were copyrighted.

13 There's no evidence in the record here that Cox
14 didn't know that the 1,397 works at issue were copyrighted.
15 There's been no dispute on that point. There is just no
16 evidence whatever.

17 And on that basis, we don't think there's any grounds
18 for an innocence instruction. Everything that Mr. Bridges said
19 is a reason that it's normal infringement, rather than willful,
20 but it doesn't go to innocence.

21 And then just briefly regarding all of his points
22 about the Copyright Alert System and Mr. Cadenhead's testimony.
23 I think -- you know, one of the reasons we argued that that
24 stuff should be excluded, and I think one of the reasons you
25 granted that motion -- well, I will let you tell us why you

1 granted it, but it is all hearsay. That there was no -- you
2 know, they didn't take any actual discovery as to what all
3 these other ISPs did. So it's improper for Mr. Cadenhead to
4 speak about what they did, essentially on speculation and
5 hearsay.

6 And similar thing is true as to Mr. Steele's
7 testimony. He may have answered Mr. Bridges questions, but I
8 think he made very clear that the reason he was able to answer
9 those questions was an inference he made based on what was
10 happening with the Rightscorp notices.

11 So then in terms of the statutory damages, getting
12 back to the questions you originally asked, the -- we think
13 that a penalty and a deterrence instruction are both quite
14 appropriate here. Those appear -- all that language appears in
15 the model instructions, the Eleventh Circuit, the Seventh
16 Circuit, the Ninth Circuit instructions. Those are standard
17 parts of the statutory damages instruction.

18 The Fourth Circuit in the Superior Builders case had
19 an extensive -- specifically approved an extensive and specific
20 deterrent instruction, which we essentially reproduce in our
21 proposed instructions. And we think that a deterrence and a
22 penalty instruction is especially appropriate in light of the
23 facts that we have shown in this case.

24 What we have shown is essentially that Cox had
25 complete indifference, complete indifference to copyright

1 violations because it wanted to preserve the revenue associated
2 with repeat infringing subscribers. And I think those are the
3 exact circumstances, consistent over years, years at a time,
4 and I think those are the exact circumstances in which a
5 deterrence instruction, a penalty instruction are appropriate.
6 That's why deterrence and penalty are in the statute, are in
7 the Copyright Act.

8 THE COURT: Okay. Thank you.

9 MR. THEODORE: And if I could just briefly address
10 mitigation.

11 THE COURT: Yes, sir.

12 MR. THEODORE: I think the key point here is that
13 they have not put on a mitigation case. So the first thing --

14 THE COURT: Well, it is an affirmative defense.

15 MR. THEODORE: It is an affirmative defense.

16 THE COURT: So they are going to say, I assume, you
17 failed to mitigate by taking the settlement notices out, the
18 settlement terms out of the notice. That's what I would
19 expect -- and so, what's your answer to that?

20 MR. THEODORE: So I think there are three responses
21 to that, Your Honor. First of all, on mitigation, it's not
22 enough to just say, oh, you should have mitigated it. The
23 defendants' burden is to show the amount, the amount that
24 mitigation would have reduced their damages. We cite, I think,
25 four cases on that in our brief.

1 And there is no evidence whatsoever in the record as
2 to the amount of mitigation here. It's not appropriate just to
3 sort of send this off to the jury in a vague, free-floating way
4 without any evidence as to what they should be doing.

5 THE COURT: Aren't they going to argue that every
6 dollar that you could -- might have collected is mitigated
7 because of the failure to take the settlements out?

8 MR. THEODORE: I don't think there is any basis in
9 the record to argue that. Because as Mr. Bridges just said,
10 let's say we had taken the settlements out and we credit
11 everything they say, all they would have done is processed our
12 notices.

13 And we know, we know that 90 percent -- and probably
14 it would have been higher for Rightscorp given that it was a
15 higher volume sender -- 90 percent of the notices that are sent
16 by copyright holders to Cox, absolutely nothing happens.

17 So I think there is no basis to say, okay, it is
18 100 percent. And they have put in no evidence whatsoever as to
19 the amount of damages.

20 Then I think the second point on this, Your Honor, is
21 that taking out the settlement language isn't really proper,
22 isn't really proper mitigation. When we think about
23 mitigation, it's you've been injured. Now, go to the hospital,
24 reduce your injury, something like that. That's not what we're
25 talking about here. The taking out the settlement language

1 doesn't go to reducing injury, it goes to the injury itself.

2 And I think there is pretty clear mitigation law that
3 people don't have to give up their rights. The mitigation
4 doctrine doesn't require people to give up their rights. And
5 BMG was entitled to ask for settlements from people who stole
6 its copyrights. I mean, that is something that BMG is entitled
7 to do.

8 Now, Cox could choose what it wanted to do with those
9 settlements, but BMG is not required to give -- Cox could do
10 what it wants with those notices, but BMG is not required to
11 give up its right to ask for a settlement in order to avoid a
12 mitigation instruction.

13 And then finally, the third thing is, even if a
14 mitigation instruction were appropriate here, the freestanding,
15 like long-form mitigation instruction that they have is
16 inappropriate in this context. In this context at most -- and
17 just to be clear, Your Honor, we think that mitigation has no
18 relationship to statutory damages. I understand that you
19 disagree with that.

20 At most, mitigation is one consideration and one
21 factor in the statutory damages analysis. It is not
22 appropriate to have a whole independent page on mitigation as a
23 free-floating defense when at most it should be a line in the
24 statutory damages instruction.

25 THE COURT: Thank you. Mr. Bridges.

1 MR. BRIDGES: He has given me a lot to respond to. I
2 will try to do so very quickly, Your Honor.

3 First, on the question of innocent infringement. I
4 ask the Court to look at our citations in our jury
5 instructions. I try to stick to the statute whenever possible.
6 And Mr. Theodore just said that innocent infringement applies
7 only when there is no knowledge of copyrighted works.

8 That is not the statute, Your Honor. Our jury
9 instruction comes from the statute. It is a question of to
10 what extent the defendant may know it to be an infringement.
11 So that's that issue.

12 On deterrence. We don't believe, Your Honor, it's
13 appropriate for the Court to pull particular factors out from
14 the factors listed in the statutory damages instruction and to
15 give them a separate instruction. And so, it's inappropriate
16 on that. Deterrence is okay as a factor, but it shouldn't be
17 teased out as a doubling down.

18 Second, the question about penalty is an interesting
19 one because the Court -- this Court said, and I've forgotten
20 which case it was, said that there should be -- the statutory
21 damages do have a relationship to actual damages.

22 Under their view, all infringement deserves a penalty
23 in statutory damages. What's left for willfulness then? And I
24 think that describing penalty as part of ordinary statutory
25 damages is different from deterrence. And I understand some

1 courts have said that, but I think they may be confusing
2 ordinary -- the ordinary range with the willful range.

3 In terms of the notices from what Mr. Cadenhead
4 learned from other ISPs about their practices, Mr. Theodore
5 said that's hearsay. We wouldn't have been offering it for the
6 truth of the matter asserted. We would have been offering it
7 for what Cox heard and understood. That's just not hearsay.

8 THE COURT: Okay. Well, I mean, I think I ruled on
9 that, actually that it was hearsay because it was being offered
10 for the truth of it at an earlier hearing.

11 MR. BRIDGES: Right. But part of the point is it
12 goes to what Cox understood its practices were in the industry
13 context.

14 THE COURT: State of mind, right.

15 MR. BRIDGES: Right. And I have to say, Your Honor,
16 a very good place to look, it's a case that the Fourth Circuit
17 cited in CoStar, and it's a Seventh Circuit case, Doe versus
18 GTE, about contributory infringement of an ISP like Cox. And
19 that case basically explains why ISPs like Cox are not
20 contributorily liable under the Sony doctrine. We have circled
21 around this, you don't want to hear it again, but there is
22 ample reason for Cox to believe that as an ISP doing what
23 normal ISPs do, it's protected.

24 The last point on mitigation. Mr. Theodore said,
25 well, defendants have to prove a specific amount of money.

1 Well, that's fine in an actual damages case where we're talking
2 about real money. We're talking about magic money in statutory
3 damages, Your Honor, to begin with. And I think the point
4 is -- because it's conjured up from a variety of factors and it
5 doesn't get tethered to anything.

6 Well, if that's the case, I think the Court's
7 questions about, well, maybe there would not have been this
8 problem at all from dollar one if BMG had mitigated by fixing
9 the notices -- Your Honor, Mr. Theodore said that the plaintiff
10 shouldn't have to give up its right in mitigation. It doesn't
11 have a right to commandeer Cox's service to force Cox to
12 communicate the way it wants Cox to communicate. It always has
13 the right to send 512(h) subpoenas, always has the right to sue
14 individuals.

15 The question is here, if BMG going back three years
16 ago had sent those notices, the infringements very likely would
17 have stopped. And that's what mitigation is about. It's
18 trying to get the offending behavior stopped through the
19 graduated response process. It is not about, oh, giving up
20 your right to get money through the system.

21 So those are my arguments, Your Honor.

22 THE COURT: All right. Thank you.

23 MR. THEODORE: Do you want to hear further from me,
24 Your Honor?

25 THE COURT: No, you're fine. Thank you.

1 MR. THEODORE: All right. Thank you, Your Honor.

2 THE COURT: Thank you. All right. This answers my
3 questions that I had coming out.

4 How is our jury doing, Joe?

5 COURT SECURITY GUARD: All here.

6 THE COURT: They're all here? All right.

7 MR. PECAU: Your Honor, just a couple of housekeeping
8 matters.

9 THE COURT: Yes, sir.

10 MR. PECAU: Your Honor, there are a number of things
11 that were brought up earlier that have to do with the witnesses
12 that are coming -- I'm sorry -- that have to do with, you know,
13 the evidence in this case and the witnesses coming up, and I
14 would just like to bring them to Your Honor's attention.

15 THE COURT: Please do.

16 MR. PECAU: So one, Cox claims that there are a
17 number of documents that are self-authenticating. We disagree.
18 And both parties are prepared to argue that.

19 We have the Rule 50 motion that BMG would like to
20 make.

21 There are also issues --

22 THE COURT: And I've read that and I'll take it
23 under -- I'll deny it without prejudice at this time.

24 MR. PECAU: Okay, thank you, Your Honor. And then
25 there are also issues with regard to Mr. Bardwell. And Cox is

1 also seeking to bar Mr. McGarty's testimony.

2 So certainly with respect, the self-authenticating
3 documents, I think, Your Honor, we could argue later, but I
4 think it would be appropriate to address the Bardwell and
5 McGarty issues that Cox has raised.

6 THE COURT: Go ahead.

7 MR. PECAU: I'm not going to do it, Your Honor.

8 THE COURT: You're the MC? All right.

9 MR. BRIDGES: One quick point, Your Honor, in light
10 of the denial of plaintiff's JMOL without prejudice. If the
11 Court later decides to entertain it, could we await the Court's
12 direction to file a response?

13 THE COURT: Yes, sir.

14 MR. BRIDGES: Thank you, Your Honor.

15 THE COURT: All right, Mr. Allan.

16 MR. ALLAN: Your Honor, good morning.

17 THE COURT: Good morning.

18 MR. ALLAN: We intend to call Dr. McGarty as a
19 rebuttal expert. Your ruling on the motion, on the Daubert
20 motion indicated Dr. McGarty's testimony may be relevant to
21 rebut assertions regarding Cox's operations. That's exactly
22 what we intend to use him for.

23 THE COURT: Tell me, what is he going to say?

24 MR. ALLAN: He is going to say -- essentially what
25 he's going to do is rebut Mr. Cadenhead's testimony that the

1 system was 96 percent effective. As you recall, that testimony
2 was very effective, we made an objection to it, you noted our
3 exception. They first tried to bring that testimony in through
4 Mr. Rosenblatt, then it was excluded. Your Honor let it in.

5 Mr. McGarty addresses this issue specifically in his
6 reports, and he ought to be able to come in and say, that's not
7 true. That the system is not effective and operationally it
8 doesn't work the way it works.

9 And all of the reasons that Mr. Bridges just
10 enunciated to the Court that, you know, had Rightscorp simply
11 taken out the settlement language three years ago, all that
12 infringement would have stopped, all of that is premised on the
13 96 percent statistic which is unsupported. Dr. McGarty ought
14 to be able to come in and rebut that. And that's precisely
15 what we intend to have him do.

16 THE COURT: Okay. I think that's highly relevant.
17 And for the record, anybody want to oppose that, Mr. Buckley?

18 MR. BUCKLEY: Your Honor, we just asked for clarity
19 on what he was going to testify to and rebut, and they wouldn't
20 share that with us. That's the first we've heard that. So on
21 that basis, no objection.

22 We do have objections to Dr. Lehr's testimony, and I
23 think he's the first witness.

24 THE COURT: Okay. And what's the objection to
25 Dr. Lehr's testimony?

1 MR. BUCKLEY: Dr. Lehr is going to testify --
2 Dr. Lehr is going to testify to points that he testified to on
3 direct and that they asked Dr. Sullivan in cross. And based on
4 the slides --

5 THE COURT: Is Dr. Lehr in the courtroom?

6 MR. WARIN: No, Your Honor, he's in the witness room.

7 THE COURT: All right. Thank you, Mr. Warin.

8 MR. BUCKLEY: Dr. Bardwell is here in case we get to
9 the point where we are talking about him.

10 THE COURT: Okay. He's just left. Okay.

11 MR. BUCKLEY: They're going to have -- according to
12 the slides we were given, they're going to have Dr. Lehr repeat
13 the calculation that he did of lifetime subscriber value times
14 60,000 subscribers, and then they're going to have him talk
15 about what they asked Dr. Sullivan on the stand about, well,
16 what if the number is 3,000 instead of 5,000. And he said, you
17 know, then you get a figure of 240 million or something.

18 So as it's -- as far as I can tell, it's all
19 testimony that's already in the record, and so we have
20 questions about what it is he's rebutting.

21 THE COURT: Good morning, Mr. Warin.

22 MR. WARIN: Good morning, Your Honor, how are you?

23 THE COURT: Good.

24 MR. WARIN: We expect Dr. Lehr's testimony to be
25 short. We heard at length from Dr. Sullivan on Friday and

1 Mr. Mencher criticizing Dr. Lehr's calculations, his
2 methodology, the accuracy of his numbers that he used from Cox.
3 We believe that's perfectly appropriate testimony, he was here,
4 he heard that testimony. To come back and say, you've heard
5 Dr. Sullivan's criticism of your calculations, your
6 methodology, your conclusions, and he made the following
7 criticisms, X, Y, Z. Do you agree with those? Why not?

8 And so, that's basically what he's doing, is he's
9 responding to the specific criticisms that Sullivan made of
10 what he did and saying why now, having heard Sullivan's
11 testimony, he disagrees with Sullivan and adheres to his
12 original calculations.

13 THE COURT: I think that's permissible. And,
14 Mr. Buckley, if you think they're getting far afield and that
15 they are just testifying about matters that they brought up to
16 Dr. Sullivan and it also is not -- doesn't go to the
17 criticisms, then you can raise an objection at that time.

18 MR. BUCKLEY: Thank you, Your Honor.

19 THE COURT: All right. Who else, what other
20 objection is there?

21 MR. WAKEFIELD: Your Honor, one other issue with
22 respect to Dr. Bardwell.

23 THE COURT: Yes, sir.

24 MR. WAKEFIELD: The plaintiff apparently wants to
25 introduce the actual names of the 123 subscribers as an exhibit

1 with personal information. They have now agreed to redact the
2 addresses and last names, but there's no dispute that there was
3 personal information provided for 123 subscribers. It seems
4 cumulative of that.

5 THE COURT: That was in a prior exhibit? I don't --

6 MR. WAKEFIELD: There's no exhibit with the names of
7 the people. And that's what they want to put in.

8 THE COURT: Just the fact that there were 122 people
9 has come in so far.

10 MR. WAKEFIELD: And they want to put in all of their
11 documents showing who they are essentially, but blacking out
12 parts of their personal information.

13 I don't see how that's relevant to anything. There's
14 no question that those came in and it's even -- you know, I
15 don't know what kind of sleuth things someone could do in the
16 public record to harass people, but it just seems unnecessary.

17 THE COURT: Well, if they don't have their addresses
18 or last names, it's a little harder than it might otherwise be
19 when perhaps the list was drawn.

20 All right. Thank you, Mr. Wakefield.

21 Good morning, Mr. Caracappa.

22 MR. CARACAPPA: Good morning, Your Honor.

23 THE COURT: Why do you want to put in an exhibit with
24 the actual partial names?

25 MR. CARACAPPA: So they objected to a number of our

1 exhibits, and that was one of them. We went back, we redacted
2 out most of the information. We don't have any intent to use
3 it. We just need the number that there were 122, that's all.

4 So we don't intend to use it or introduce it or
5 submit it into evidence. If anything, we were going to use it
6 as a demonstrative, that's all.

7 THE COURT: Okay. All right. So that takes care of
8 that.

9 MR. CARACAPPA: Is it that the only objection?

10 MR. WAKEFIELD: Well, sorry. There were some
11 additional new documents that they apparently want to use in
12 the Nowlis direct.

13 It looks like, the Court will recall, when Mr.
14 Negretti was being cross-examined, plaintiffs had found some
15 advertising materials, more recent advertising materials
16 promoting speed. Those weren't discussed or cited in his
17 report. So I don't know that that's proper even on rebuttal.

18 THE COURT: Well, they were all Cox documents, and
19 you had extensive testimony about the latest, greatest mega
20 offering from Cox, whatever it was called, Giga something or
21 other, so I think that that's all fair game.

22 MR. WAKEFIELD: Giga something or other is right,
23 Your Honor. So then we will withdraw the objections to those.

24 THE COURT: Well, I'll note your exception.

25 MR. WAKEFIELD: Yeah.

1 THE COURT: But I understand.

2 MR. WAKEFIELD: Thanks.

3 THE COURT: All right. Do you need time to
4 reshuffle, or can we get our jury --

5 MS. JOBSON: I have one item, if I might.

6 THE COURT: Ms. Jobson.

7 MS. JOBSON: I believe Mr. Pecau mentioned some
8 self-authenticating documents and judicial admissions, and I
9 think we can go over those later so we can get started today.

10 But one thing that would be helpful for us in terms
11 of organizing, I think both sides have agreed on a method of
12 organizing the binders that will be sent back to the jury, and
13 we wanted to make sure that that was acceptable to Your Honor.

14 THE COURT: Yeah, that was fine. Thank you. That
15 makes good sense, and I appreciate the work that you did to get
16 that together yesterday.

17 MS. JOBSON: Okay. So you have discussed with
18 Ms. Pack --

19 THE COURT: Yeah, last evening. So I think we're all
20 on all fours with that one. That was great.

21 MS. JOBSON: Great. Wonderful. Thank you.

22 THE COURT: Thank you. Mr. Pecau.

23 MR. PECAU: Your Honor, I think we just need about a
24 minute-and-a-half for the reshuffling and then we'll be ready
25 to go.

1 THE COURT: All right, then let's take a brief recess
2 and we'll come back and we'll get our jury.

3 All right, we're in recess.

4 NOTE: At this point a recess is taken; at the
5 conclusion of which the case continues in the absence of the
6 jury as follow:

7 JURY OUT

8 THE COURT: All right. Ready for our jury?

9 MR. WARIN: We are, Your Honor.

10 THE COURT: Joe, let's get our jury, please.

11 NOTE: At this point the jury returns to the
12 courtroom; whereupon the case continues as follows:

13 JURY IN

14 THE COURT: All right, please be seated.

15 Good morning, ladies and gentlemen. I hope you had a
16 terrific weekend. The weather certainly cooperated. And
17 yesterday as well.

18 And give me a nod of heads that you didn't do any
19 research or investigation or talk to anybody about the case.
20 All right, great. Thank you very much.

21 All right. As I said on Friday, we will begin the
22 rebuttal evidence at this time by BMG.

23 Mr. Warin.

24 MR. WARIN: Thank you, Your Honor. Your Honor, for
25 our first rebuttal witness we will call Dr. William Lehr.

1 THE COURT: Dr. Lehr has been previously sworn.

2 Good morning, sir.

3 THE WITNESS: Good morning.

4 THE COURT: All right. Please, whenever you are
5 ready. All right.

6 WILLIAM LEHR, recalled by counsel for the plaintiff,
7 having been previously duly sworn, testifies and states:

8 DIRECT EXAMINATION

9 BY MR. WARIN:

10 Q. Good morning, Dr. Lehr.

11 A. Good morning.

12 Q. All right. You were here on Friday afternoon, correct?

13 A. Yes, I was.

14 Q. All right. And did you listen to the testimony of
15 Dr. Ryan Sullivan?

16 A. Yes, I did.

17 Q. Do you know Dr. Sullivan?

18 A. I do not know him personally, no.

19 Q. All right. Dr. Sullivan criticized some of your
20 conclusions and methodologies, correct?

21 A. Yes, he did.

22 Q. In your report and your earlier testimony you said that
23 you did not believe it was possible to accurately value BMG's
24 lost sales as a result of the alleged infringement of BMG songs
25 by Cox subscribers, correct?

1 A. Yes, I did. In addition to the methodological problems,
2 there is a number of data issues that in this case make it
3 fundamentally, I believe, impossible to do that.

4 Q. Did Dr. Sullivan agree with you on that?

5 A. No, he did not.

6 Q. All right. Did Dr. Sullivan attempt to calculate the
7 value of the lost sales of BMG songs as a result of
8 infringement by Cox subscribers?

9 A. Yes, he did.

10 Q. All right. I would like to show, if you could, Karl,
11 demonstrative Exhibit No. 35 from Dr. Sullivan's testimony.

12 All right. Do you see that on the screen?

13 A. Yes, I do.

14 Q. All right. And in the harm to BMG, Dr. Sullivan has a
15 number here of \$815,979, which I believe was his effort to do
16 what you said wasn't possible, which is calculate the lost
17 value of the sales to BMG, correct?

18 A. Yes. I said I don't believe it's possible to come up with
19 a reasonable and accurate, reliable estimate of that.

20 Q. Would you explain to us why that is?

21 A. Well, first, as I said, there's a lot of methodological
22 issues that you would have to confront in doing this. But if
23 you don't have the right data, you basically just can't even
24 get out of the starting gate. And in this matter, significant
25 pieces of data that you really have to have just isn't

1 available in this matter.

2 Q. What data is that that you think would be necessary to
3 project a reasonable calculation of BMG's lost sales?

4 A. Well, the first thing that you would need to do, and
5 Dr. Sullivan tries to do, is come up with the number of illegal
6 copies that are out there in the marketplace that are competing
7 with the legal sales of BMG's content. And the data to come up
8 with such an estimate just doesn't exist.

9 What exists is some data about a subset of Cox
10 subscribers and whether or not they were running BitTorrent.
11 And when they were running BitTorrent for part of the time
12 those subscribers were observed, whether or not there were
13 copyrighted materials on their computers.

14 From that data, you just don't know how many times
15 illegal copies may have been uploaded or shared from those Cox
16 subscribers that were identified in the data.

17 And so without that, you know, it could have been,
18 you know, 1,000, 2,000, or 3,000 times or whatever, those files
19 would have been uploaded or downloaded. There is just no basis
20 for estimating that unless one wants to make, you know, ad hoc,
21 arbitrary assumptions that aren't supported with evidence in
22 this case.

23 Q. All right. Is there any other reason why you believe it
24 is impossible to accurately calculate BMG's lost sales as a
25 result of the infringement on the Cox network?

1 A. Well, in addition to the problem with not knowing how many
2 illegal copies would be competing with the legal copies, you
3 don't know anything about the behavior of those Cox subscribers
4 and about others that may have acquired illegal copies from
5 Cox, what they would have purchased and what they would have
6 been willing to pay had they purchased it.

7 For example, you know, if they downloaded an illegal
8 copy, would they have --

9 MR. BUCKLEY: Your Honor, this is beyond the scope of
10 this expert's testimony.

11 THE COURT: Overruled. I am going to allow it.

12 A. If they had purchased those illegal copies, would they --
13 if they hadn't been able to get those illegal copies, would
14 they have instead purchased a physical CD? Okay. Or would
15 they have downloaded a file? Or would they have purchased more
16 streaming music? There is not evidence in this case, you know,
17 unless you want to make some arbitrary assumptions. Like for
18 example, physical sales don't matter at all. That's an
19 assumption that Dr. Sullivan makes. I don't think there is
20 support in this case or in the literature that would allow one
21 to say that illegal sales don't cannibalize or substitute for
22 legal sales of physical media. So that's an example.

23 BY MR. WARIN: (Continuing)

24 Q. So physical media, what do you mean?

25 A. CDs, for example. You know, a user says, I downloaded

1 this, I have it, I don't need to now buy the physical CD.
2 Dr. Sullivan in his analysis says that's not a way in which BMG
3 would have lost revenue. And I just don't think there is any
4 evidentiary basis for making that assumption.

5 Q. Any other reasons why you continue to believe that it is
6 impossible to estimate accurately the amount of lost sales as a
7 result of BMG's works being infringed on the Cox network?

8 A. Well, my original direct testimony I also mentioned that
9 their -- you know, trying to compete with illegal copies
10 distorts and limits the business models of the legal rights
11 holders.

12 So the pricing that BMG might have been able to
13 realize in its legal sales of the goods, the business models it
14 might have wanted to pursue, all of these things would have
15 been affected by competing with illegal sales. And there is
16 just no good way to estimate that in this case, and it would be
17 a difficult thing to undertake even in a general sense.

18 Q. All right. I would like to move on. We have talked about
19 the first part of your testimony that Dr. Sullivan criticized,
20 which is your view that it's impossible to determine the value
21 of the lost sales of BMG songs as a result of the infringement
22 of the Cox network.

23 I would now like to talk about the economic benefit
24 to Cox, which was another part of your original testimony and
25 your report, and it was something that Dr. Sullivan, when he

1 was here on Friday, criticized.

2 Were you here for that criticism?

3 A. Yes, I was.

4 Q. All right. Now, I would like to -- did Dr. Sullivan come
5 up with his own number competing with yours as to the benefit
6 to Cox of the illegal sales or copying or uploading and
7 downloading of BMG songs on the Cox network?

8 A. Yes, he argued that he had what he said was an estimate of
9 the maximum possible economic benefit that BMG could have
10 realized.

11 Q. And so, Dr. Sullivan, as I understand, upper bound benefit
12 to Cox, which is what we are talking about --

13 A. Yes.

14 Q. -- his number was what?

15 A. Well, he said that the maximum benefit upper bound was
16 \$2,145,585. Which, you know, is essentially just the same as
17 the revenue benefit that BMG would have been harmed by. And I
18 have already explained why I don't think that upper line
19 estimate makes no sense.

20 But to say that the harm that BMG would have
21 experienced in its sales, upper bounds the business value to
22 Cox of having infringing subscribers on its networks, just
23 makes no sense to me as a matter of economic analysis.

24 BMG is principally in the business of selling songs,
25 and Cox is principally in the business and realizes its profits

1 in selling cable services to cable subscribers, and there is no
2 reason that I can think that would suggest that the potential
3 harm to BMG would provide any kind of upper bound estimate of
4 the benefit to Cox.

5 Q. Right. You did calculate the benefit to Cox of what you
6 felt was an appropriate measure of the value of the infringing
7 customers to Cox, correct?

8 A. Yes.

9 Q. All right. If we could have on the screen PDX 007.

10 Now, I believe this was a display that you used
11 showing how you calculated the value of an individual
12 subscriber to Cox, correct?

13 A. Yes.

14 Q. All right. And then you used this number, it says for one
15 subscriber, to calculate the value of the infringing
16 subscribers to Cox, correct?

17 A. Yes. I mean, you -- that is certainly what this number
18 allows you to do, yes.

19 Q. All right. And when Dr. Sullivan was here on Friday, he
20 criticized your calculations here, correct?

21 A. Yes.

22 Q. All right. Why don't we walk through the various
23 criticisms that he made of your calculations and methodology.

24 Now, what was the first criticism that you recall
25 that he made of your calculations and methodology?

1 A. Well, what this estimate is, it's an estimate of what is
2 the value to Cox of retaining a subscriber or attracting a
3 subscriber, or some relatively small number of subscribers
4 relative to the size of Cox's business.

5 And it takes into account what those subscribers
6 actually contribute to Cox's bottom line. And because the
7 typical subscriber purchases multiple services from Cox, when
8 they purchase the high-speed Internet service, and because
9 that's convenient and beneficial to both Cox and those
10 subscribers, I looked at what the typical subscriber pays. And
11 that takes account of the fact that the average subscriber,
12 80 percent of, I think, the Cox subscribers purchase at least
13 two services, and a very significant number purchase all three.

14 So I took account of the revenues and profits
15 associated with those, that that subscriber or a subscriber
16 contributes to Cox's bottom line.

17 Dr. Sullivan argued that I should have ignored any
18 revenues or profits contribution associated with the
19 subscribers' purchase of video and telephone services.

20 Q. Do you agree with that?

21 A. I do not agree with that.

22 Q. Why not?

23 A. Because as I explained in my direct testimony and I was
24 talking about right now, the typical subscriber purchases more
25 services. Cox knows this. This is the way the business is

1 marketed. Customers who purchase more services get a discount
2 on those services. The data that was provided by Cox to
3 provide the estimates in this reflect those discounts.

4 And so, to have ignored those would have just, I
5 think, been, you know, inappropriate and wouldn't have captured
6 the benefit Cox realizes from having these subscribers who as
7 part of what they are doing when they are Cox subscribers is
8 engaging and infringing activity, would be a mistake.

9 Q. That was the first criticism. Did Dr. Sullivan make any
10 other criticisms of your calculations?

11 A. He always challenged me on the data I used for the life
12 span of a typical customer, and he cited some other data. The
13 data I used was data that had been validated in deposition by
14 Mr. Negretti and was part of an exhibit that I saw shown in the
15 proceeding several times while I was listening to testimony
16 earlier in the week.

17 Q. And the life span you used was 5.6 years, correct?

18 A. Yes, I used the life span of 5.6 years.

19 Q. Did he criticize your use of a profit margin at all in
20 making this calculation?

21 A. Yes, that was another significant criticism that he made
22 of the analysis I did. What I looked at for the profit margin
23 using the data from Cox's financial documents was what's called
24 the contribution margin. And that's taking the revenues and
25 taking off the product direct costs, those costs that are

1 directly attributable to offering that service. And that would
2 vary when you add or subtract marginal subscribers.

3 He said what I should have done is have chosen
4 another number that was also on those sheets that is referred
5 to as the controllable margin. That is actually what the text
6 on the Cox documents calls it. And what that does is that
7 actually --

8 Q. Let me stop you. So you used one number --

9 A. Yes.

10 Q. -- from Cox's actual documents, and he said you should
11 have used another number; is that right?

12 A. That's right.

13 Q. Please continue.

14 A. It turns out on a percentage terms for the data service,
15 the contribution margin is 96.6 percent for the Internet
16 service, and that number is comparable to estimates that have
17 been provided in the trade press and by the investment
18 community, you know, for other publicly traded cable companies.
19 So it is one that I think is consistent with the data in Cox's
20 own data.

21 The number he said I should have used is, again, it's
22 called the controllable margin. That number is like
23 68.1 percent. So lower, because it includes additional costs.
24 And the additional costs it includes are operating expenses,
25 and those operating expenses are things like network

1 maintenance, sales, and marketing. There are some other line
2 items in there.

3 And the question about whether or not those costs
4 should be included or not in estimating the value of
5 incremental subscribers is whether or not those costs would
6 significantly change if you added or subtracted an individual
7 subscriber.

8 And I -- you know, understanding how this business
9 operates and what those costs were, I determined that they do
10 not, are not likely to change, and so it would have been
11 inappropriate to have included them and to have used the
12 68.1 percent margin.

13 And later when I heard Mr. Mencher testify, he's a
14 financial analyst from Cox, he said this is the right data, you
15 know, this is the right cost revenue data, internal data. You
16 know, I'm not reading something that has errors in it. It is
17 from Cox. And he admitted that networks still need to be
18 maintained when you add and subtract a few subscribers. You
19 still need field service people. That the bulk, almost all, if
20 not all of those expenses wouldn't change if you add or
21 subtract a few subscribers.

22 You know, you still need guys to be out there. You
23 know, if a tree falls on a line, you have to have someone out
24 there to fix that line. And it doesn't matter whether or not
25 that line is actually providing service to any subscribers in

1 that neighborhood. As long as you are in that neighborhood,
2 you need that. And if you are adding and subtracting a few
3 subscribers, you are still in that neighborhood, so you still
4 have those costs. So it would have been --

5 MR. BUCKLEY: Your Honor, is there a question?

6 THE COURT: There was a question. And he is
7 explaining why he used a particular line item and not another.
8 So I will allow it.

9 But let's focus the questions a little more, if you
10 would.

11 BY MR. WARIN: (Continuing)

12 Q. Do you believe, as a result of hearing Mr. Mencher's
13 testimony and Dr. Sullivan's testimony, that you used the wrong
14 number for the proper factor for Cox?

15 A. No, I do not. I think it is still appropriate to have
16 used the 96.6 percent incremental contribution margin as the
17 profit contribution of an individual subscriber to Cox's bottom
18 line, and not the 68.1 percent that Dr. Sullivan recommended.

19 Q. Now, even though you believe you used the right number, I
20 have asked you to do the calculation using Dr. Sullivan's
21 number, haven't I?

22 A. Yes.

23 Q. All right. I would like to show the next slide, please,
24 Karl.

25 All right. Would you tell us what this slide

1 displays.

2 A. What this slide shows is my calculation, which I still
3 conclude is the right economic analysis. And then over to the
4 right it says, but if I were to include those additional costs,
5 those operating expenses and deduct them from the revenues for
6 the service, that would reduce the contribution each subscriber
7 would make per month. And what that would do is it would
8 reduce that amount from \$98 to \$65.

9 And that then would reduce -- you know, you are
10 getting \$65 instead of \$98 a month over the life span of that
11 subscriber. And so, that would reduce the estimate of the
12 value of the subscriber to \$3,525.

13 Q. All right. Did Dr. Sullivan do that calculation on Friday
14 when he was here?

15 A. No.

16 Q. So this is a calculation you have done using the number he
17 suggested, correct?

18 A. Yes.

19 Q. All right. Now, your number, 5,294, is there any industry
20 data that is available that would indicate how that number
21 compares with industry averages for the value of a customer?

22 A. Well, in my original testimony I did look at some other
23 data. And so, one of the other ways one could think about how
24 you might get to a number like this is look at financial
25 transactions, merger and acquisition activity, announced deals

1 that get reported in the trade press.

2 And so those articles will often say, you know, cable
3 company A is buying some assets from cable company B, and they
4 are paying some large number for those assets, and that's going
5 to involve, you know, some number of subscribers.

6 So you can take that reported value and divide it by
7 those numbers of subscribers and you come up with an estimate
8 of what did those companies think, you know, was the value of
9 acquiring that number of subscribers and put it on a per
10 subscriber basis.

11 I looked at a number of transactions from 2012 and
12 those values --

13 MR. BUCKLEY: Improper rebuttal, Your Honor.

14 THE COURT: Approach the bench, please.

15 NOTE: A side-bar discussion is had between the Court
16 and counsel out of the hearing of the jury as follows:

17 AT SIDE BAR

18 THE COURT: Where is this coming from?

19 MR. WARIN: He had in his report earlier that his
20 value of 5,200, which he prepared for litigation, based upon
21 Cox's numbers, estimated a value of a customer is consistent
22 with industry data by other cable companies when they value a
23 customer when they are making an acquisition.

24 THE COURT: So it was in his Rule 26 report?

25 MR. WARIN: Yes.

MR. BUCKLEY: Your Honor, it was. And Dr. Sullivan rebutted it at that point. They didn't bring it out in direct. And Dr. Sullivan's response to his lifetime subscriber value number was he used the wrong profit margin, not -- it's not related to transactions that --

MR. WARIN: But to show he used the right number, he can show others used the number.

THE COURT: Okay. I will allow it. Thank you. Your exception is noted.

MR. BUCKLEY: Thank you.

NOTE: The side-bar discussion is concluded; whereupon the case continues before the jury as follows:

BEFORE THE JURY

THE COURT: You accurately recognized him as being the leader of the group here. Go ahead.

MR. WARIN: If he's not ready, we're not ready.

THE COURT: All right.

BY MR. WARIN: (Continuing)

Q. All set? Dr. Lehr, I think I was asking you whether or not your number of 52 -- \$5,294 is consistent with other valuations as to the value of a customer in the Internet and cable space, and you were answering when we approached.

A. Sorry. I was explaining that I did look at a number of transactions, it was part of my original report that came up with the estimate of 5,294. And these were not talking about

1 acquiring Cox assets. These were talking about acquiring other
2 cable assets amongst other cable companies.

3 And for those transactions, there was a range of
4 value between 4 and \$6,000 when you do that calculation, value
5 of the transaction divided by the number of subscribers
6 involved. It comes out to 4 to \$6,000.

7 Q. All right. Now, the number that I asked you to calculate
8 was the profit -- excuse me, the value of a customer using
9 Dr. Sullivan's number with respect to the net profit, correct?
10 That's the 3,500?

11 A. Well, it wasn't -- it was the controllable margin, which
12 is Cox's controllable margin. It is not Dr. Sullivan's, it's
13 the one he said I should have used. And I get a lower number,
14 it's 3,525.

15 Q. Did you do a calculation using Dr. Sullivan's lower number
16 that you don't agree with with respect to the lifetime value of
17 a Cox Internet subscriber?

18 A. Well, in my -- I did. In my earlier testimony I had said,
19 you know, rounding this to like \$5,000, you know, if there were
20 60,000 infringing subscribers, then 60,000 times 5,000 is 300
21 million. And that was, that's an estimate of the financial
22 benefit that Cox derives from having those infringing, 60,000
23 infringing subscribers if you think the value is about \$5,000.

24 Q. Have you prepared a slide that demonstrates the
25 comparison?

1 A. I have, because that --

2 Q. Can you tell us what this slide displays?

3 A. Yeah, the calculation I did was approximate. So I said it
4 was about 300 million. It turns out it's 317,640,000 if you
5 actually multiple out all the digits.

6 If you do that same calculation applied to the 3,525,
7 the number is lower, but it's \$211,500,000.

8 Q. All right. So taking into account Dr. Sullivan's
9 criticism with respect to the profit margin you used, if you
10 used his recommended profit margin of 68.7 and multiplied it
11 times 60,000 repeat infringers, the value to Cox would be what?

12 A. 211,500,000. And, you know, that's still a very
13 significant number. And prior to doing my analysis, if the
14 financial data had said that the contribution margin -- I mean,
15 the contribution margin, the right one said that the value was
16 3,525, then this would have been my final estimate.

17 But I still think the 317 million is a more accurate
18 estimate.

19 Q. All right. You mentioned this briefly, but just let me
20 cover it with one last question or two. You were here also on
21 Friday for Mr. Mencher's testimony, correct?

22 A. Yes.

23 Q. All right. Did anything that Mr. Mencher said about the
24 profitability of Cox and value of individual subscribers change
25 your view as to the conclusions you reached?

1 A. No. It reaffirmed them because, you know, it made me more
2 confident that I fully understood what the data was and how I
3 was using it.

4 MR. WARIN: All right. We have no further questions.

5 THE COURT: All right. Cross-examination,
6 Mr. Buckley.

7 CROSS-EXAMINATION

8 BY MR. BUCKLEY:

9 Q. Good morning, Dr. Lehr.

10 A. Good morning.

11 Q. Nice to see you. So, Dr. Lehr, you've testified now twice
12 about your lifetime subscriber value calculation, right?

13 A. Yes.

14 Q. And that lifetime subscriber value, that's the value of
15 any Cox subscriber, right?

16 A. It's the value -- it's an estimate of the value of an
17 average subscriber. And my testimony actually explained that I
18 thought it was an underestimate of the value of infringing
19 subscribers. But because there wasn't data available in this
20 case to estimate the additional value of having infringing
21 subscribers, I used the average value.

22 Q. Okay. But this value, in your original calculation it was
23 \$5,200 or \$5,300 roughly, right?

24 A. Yes.

25 Q. And that's the value of a subscriber whether that

1 subscriber is an infringer or not?

2 A. That's an estimate of the average value of a subscriber,
3 yes.

4 Q. And the reason you're focussed on that lifetime subscriber
5 value is that your view is if Cox were to terminate a
6 subscriber, it's going to -- Cox is going to lose some or all
7 of that value, right?

8 A. Well, if Cox terminated a subscriber, it would lose that
9 value, but it's a value of Cox having subscribers on its
10 network and potentially attracting subscribers to its network
11 which it does in the normal course of its business, they would
12 be worth \$5,294.

13 Q. Right. But the reason it's relevant here and to your
14 testimony is that if Cox were to terminate one of those folks,
15 they're going to lose some or all of that value, right?

16 A. Well, the reason it's relevant I believe in this testimony
17 is it captures the financial benefit that Cox derives from
18 having infringing subscribers on its network.

19 Q. Well, not infringing subscribers, subscribers generally.
20 I think that's what you just said.

21 A. Well, no, I said -- I'm using it as an estimate because
22 it's the only estimate I have data with which to estimate of
23 the infringing subscribers. It also turns out it would be a
24 reasonable estimate for the average subscriber given the data
25 that's in this case. I think the infringing subscribers, the

1 evidence shows are even more valuable to Cox.

2 Q. And the idea is if Cox were to terminate some or all of
3 those infringing subscribers as you've called them, they're
4 going to lose some or all of that lifetime value?

5 A. Right. So, for example, if it no longer had those 60,000
6 subscribers on their network, then it would lose the revenue
7 and it would lose the costs associated with handling those
8 subscribers.

9 Now, those 60,000 subscribers, if it lost them, I'm
10 not anticipating they would lose them all in a single market.
11 Because if they were to lose them all in a single market, that
12 might be, oh, they're getting out of some state, for example.

13 I don't know, as I sit here right now, that probably
14 wouldn't be all the subscribers they have in any state, but it
15 might be how many subscribers they have in a town.

16 Were they to do that, then there might be some
17 operating expenses, for example, that were included in the
18 controllable margin that I didn't include.

19 But were it to lose that level of subscribers, yeah,
20 it would lose 60,000 times 5,000, or about \$300 million of
21 financial benefit.

22 Q. And you originally calculated the lifetime subscriber
23 value as \$5,300, and now you've used Dr. Sullivan's profit
24 margin and you've calculated a value of \$3,500, right?

25 A. At the direction of counsel, yes.

1 Q. Okay. But your position is that the specific number
2 doesn't matter very much, whether it's 3,500 or 5,300, when you
3 multiple it by 60,000, it still gives you a big number, right?

4 A. No. The number absolutely matters. And the number ought
5 to be informed by the data. And I used the data and I
6 explained how I used the data. I think that had the data been
7 different -- like, for example, I didn't know what Cox's data
8 is, it's a privately held company. Until they gave me their
9 financial data, I couldn't have come up with this number. I
10 could have said, I think it's going to be like this because
11 it's probably like other publicly-traded cable companies. But
12 the data shows what it is, and that shows that it's \$5,294 when
13 you use the data that was actually in this case. That is a
14 large number.

15 If the data had been different and it had showed that
16 my calculation of 5,294 was actually the 3,500 you get, using
17 the data appropriately, then it would still be a large number.
18 So that is true.

19 But it is not correct to say that my testimony is
20 that that 3,500 is a better estimate or more appropriate use of
21 the data in the context of this case.

22 Q. Yeah, and that's not what I said. So rather than
23 re-testify, and let's focus on what I'm asking.

24 What I said was, you're testifying today that even if
25 you used the 3,500 and Dr. Sullivan's numbers, when you

1 multiple it by 60,000, you still get a big number, right.

2 A. Yes.

3 Q. That's what you said on direct.

4 A. Sorry, sorry, yes, you still get a big number.

5 Q. It's a big number, right?

6 A. Yes, it's still a very --

7 Q. Whether you use 5,200 or 3,500, when you multiple it by
8 60,000, you get a big number?

9 A. You get a big number, but you had earlier said it doesn't
10 matter --

11 THE COURT: Let's not argue back and forth. It's a
12 big number. You've testified a minute ago that it was.

13 Go ahead, Mr. Buckley. Next question.

14 BY MR. BUCKLEY: (Continuing)

15 Q. So, Dr. Lehr, how many subscribers does Cox terminate
16 based on copyright notices every year?

17 A. As I sit here right now, I don't know, but I think I've
18 seen some testimony that, you know, it is quite a small number.
19 It's nowhere near \$60,000.

20 MR. WARIN: Your Honor, may we approach?

21 THE COURT: Yes.

22 NOTE: A side-bar discussion is had between the Court
23 and counsel out of the hearing of the jury as follows:

24 AT SIDE BAR

25 MR. WARIN: The witness just said, "I don't know."

1 And I want to make sure we don't have any testimony from Mr.
2 Buckley that is not supported by testimony of a witness as to
3 how many they terminate because of copyright infringement.

4 THE COURT: So is your next question going to be,
5 would it surprise you to know that Cox terminated --

6 MR. BUCKLEY: No, I'm going to ask whether he knows
7 how many they terminated in 2012, 2013, 2014. I am going to
8 ask him some questions about the churn rate that he calculated.

9 MR. WARIN: Churn rate is okay. He said, I don't
10 know how many they terminated because of copyright
11 infringement, and I think --

12 THE COURT: He said he thinks it's a small number.

13 MR. WARIN: Right. So I think we leave it at that.
14 If he wants to go to churn rate, I'm okay.

15 MR. BUCKLEY: Okay.

16 THE COURT: Thank you.

17 NOTE: The side-bar discussion is concluded;
18 whereupon the case continues before the jury as follows:

19 BEFORE THE JURY

20 BY MR. BUCKLEY: (Continuing)

21 Q. Sorry, Dr. Lehr. So do you know how many subscribers Cox
22 terminated based on copyright notices in 2012?

23 MR. WARIN: Objection, asked and answered, Your
24 Honor.

25 THE COURT: Overruled.

1 A. No, I don't know precisely, but I believe I've seen
2 evidence that says that it's substantially less -- it's nowhere
3 near 60,000.

4 BY MR. BUCKLEY: (Continuing)

5 Q. Okay. But you don't know the number?

6 A. Not precisely, no.

7 Q. Okay. How about for 2013?

8 A. No.

9 Q. How about 2014?

10 A. The same answer. I mean, I know it's been -- I've seen
11 evidence that says it's quite a small number, but I don't know
12 precisely.

13 Q. And you've said more than once and then you said the last
14 time you testified, you don't have an opinion about how many
15 people Cox should have terminated?

16 A. That's correct.

17 Q. Dr. Lehr, in your testimony, and again, we saw it today on
18 the slide, you've used a number of 60,000 people, right?

19 A. Yes.

20 Q. Those are 60,000 Cox account holders?

21 A. Those are -- the evidence I've seen in this case says
22 those are 60,000 identified repeat infringers. So they're a
23 subset of the total number of infringers on Cox's network.
24 But, you know, that's the number that testimony in this case
25 has said are the number of ones that could be identified as

1 repeat infringers.

2 Q. Okay. So you anticipated my next question. Where did
3 that 60,000 number come from?

4 A. I believe that's the conclusion from Dr. Bardwell's
5 analysis.

6 Q. You believe?

7 A. As I sit here right now, that he analyzed the Rightscorp
8 data and identified 60,000 repeat infringers in that data
9 which, as I've explained, is a subset of the total infringers.
10 So it's, you know, an absolute lower bound on the number of
11 possible infringers.

12 Q. Dr. Lehr, my question is just where does the 60,000 come
13 from? You didn't calculate it, right?

14 A. That's right.

15 Q. Right. And you said you think it came from Dr. Bardwell's
16 testimony, right?

17 A. As I sit here right now, I believe it came from
18 Dr. Bardwell's testimony, yes.

19 Q. Are you aware of any other source than Dr. Bardwell?

20 A. Well, I imagine that it comes from --

21 Q. The question is, are you aware of any other source than
22 Dr. Bardwell for the 60,000 number?

23 A. I'm confused in trying to answer this question as to what
24 constitutes evidence.

25 THE COURT: Just say you don't understand the

1 question.

2 THE WITNESS: I don't understand the question.

3 BY MR. BUCKLEY: (Continuing)

4 Q. The 60,000 number that you've used in your analysis that
5 you multiplied by your lifetime subscriber value, I just want
6 to know where you got that number. You said you didn't
7 calculate it. You said you think it came from Dr. Bardwell.
8 Is there some other source that supports the 60,000? Can you
9 answer that yes or no?

10 A. I don't believe there's another source that I've seen that
11 does that.

12 Q. Thank you, that's all I was asking. Thank you.

13 MR. WARIN: Your Honor, may we approach?

14 THE COURT: No.

15 MR. WARIN: The 60,000 issue was not a criticism --

16 THE COURT: Hold on.

17 MR. BUCKLEY: Wait, didn't --

18 THE COURT: Approach then.

19 NOTE: A side-bar discussion is had between the Court
20 and counsel out of the hearing of the jury as follows:

21 AT SIDE BAR

22 THE COURT: Don't start blurting stuff out. That's
23 not good.

24 MR. WARIN: I'm sorry, Your Honor.

25 THE COURT: Okay. What's your --

1 MR. WARIN: The 60,000 number was not a criticism
2 that Dr. Sullivan made of Dr. Lehr. So he did not in his
3 direct testimony today go into whether the 60,000 was valid or
4 not. All he did today was respond to the specific criticisms
5 of Dr. Sullivan and identified them.

6 They're now trying to get into another area that was
7 not covered by direct.

8 THE COURT: Okay.

9 MR. BUCKLEY: Your Honor, he got up today --

10 THE COURT: So the objection is beyond the scope?

11 MR. WARIN: Yes.

12 MR. BUCKLEY: He put up a slide that said the
13 economic benefit to Cox is \$317 million. And there's two
14 inputs to that, subscriber value and the 60,000. I have asked
15 him about it. He said he didn't know where it came from. I've
16 got one or two more questions and I'll let it go.

17 THE COURT: Well, you've been going back and forth
18 with him. What are your other questions?

19 I mean, I've allowed you -- he has testified he
20 thinks it's Bardwell. Otherwise he doesn't --

21 MR. BUCKLEY: I'm not going to ask anymore about
22 where the number came from.

23 THE COURT: Okay. What else do you want to ask
24 about? It's beyond the scope of direct. So why is it
25 relevant?

1 MR. BUCKLEY: Well, it's embedded in his --

2 THE COURT: That's why I was --

3 MR. BUCKLEY: -- the universe of what --

4 THE COURT: Okay. I'm at fault.

5 MR. BUCKLEY: I talked over the judge.

6 THE COURT: So what are your additional questions on
7 the 60,000 subject, or are you moving on?

8 MR. BUCKLEY: This is about his analysis, not
9 generally. The 60,000 is embedded in his opinion.

10 THE COURT: Correct.

11 MR. BUCKLEY: That we should have terminated more
12 people than we did, and I think I'm entitled to ask him about
13 that. That's what he has just gotten him to testify about.

14 THE COURT: You asked him already whether he had done
15 any analysis -- on whether he had made -- whether he had an
16 opinion on whether Cox should have terminated, and he said no.

17 MR. BUCKLEY: He said no. I would like to ask, I
18 would like him to confirm again he didn't know who those people
19 are and neither does Rightscorp. So this 60,000 that we are
20 supposed to terminate --

21 THE COURT: That is totally irrelevant based on my
22 rulings. So let's move on to some other subject.

23 MR. BUCKLEY: Okay. Thank you, Your Honor.

24 THE COURT: Thank you.

25 NOTE: The side-bar discussion is concluded;

1 whereupon the case continues before the jury as follows:

2 BEFORE THE JURY

3 BY MR. BUCKLEY: (Continuing)

4 Q. Dr. Lehr, one of the inputs for your lifetime subscriber
5 value calculation was churn, right?

6 A. Well, the life span which is related to churn.

7 THE COURT: Well, answer yes or no if you can. And
8 we'll get through this a little more quickly.

9 THE WITNESS: Sorry. Yes, indirectly.

10 BY MR. BUCKLEY: (Continuing)

11 Q. Okay. And maybe I misheard, I actually thought you used
12 the term "churn" and I thought maybe you even had a slide that
13 referenced it. But can you describe what churn is?

14 A. Well, churn is the rate at which subscribers are leaving
15 your network.

16 Q. Okay. And that was part of -- that was one of the inputs
17 to your calculations, right?

18 A. As I explained, I used a life span, and that's what I
19 meant when I said indirectly, churn and life span can be
20 related.

21 Q. So what data did you look at to calculate life span?

22 A. So the data I calculated for life span, there was an
23 exhibit that Mr. Negretti testified to, and I believe it was
24 shown at trial here several times, that actually showed that
25 the customer life span of the average Cox subscriber was

1 increasing over time and was 67 months. And 67 months is
2 5.6 years. And so, that was attested to at Mr. Negretti's
3 deposition. That was the exhibit. That was where I got my
4 estimate of the life span.

5 Q. And did you focus on life span for high-speed Internet
6 subscribers specifically or subscriber life span generally?

7 A. Well, the subscribers I focus on is the subscribers, the
8 high-speed Internet subscribers. And the life span data I had
9 was the data that Mr. Negretti used. And as I sit here right
10 now, I don't remember if that exhibit or if his deposition
11 testimony was limited to subscribers that as one of the
12 services they purchased was broadband Internet services.

13 Q. So for high-speed Internet you're aware that Cox
14 terminated 1.76 million subscribers in 2014?

15 MR. WARIN: Objection, Your Honor.

16 Q. Disconnected their service.

17 MR. WARIN: Beyond the scope.

18 THE COURT: Overruled. I'll allow it.

19 A. I don't know that specific number, but I believe the
20 source of it, Dr. Sullivan in his rebuttal report referenced a
21 Cox document. I went and looked at the actual Cox document and
22 it has a bunch of numbers, it has two lines of disconnects on
23 it. And it's unclear what exactly that data refers to and why
24 there would be two lines there and why the right one to focus
25 on would be the one that was actually higher in terms of

1 disconnects. He took the higher disconnect, and that's all he
2 reported in his report.

3 Now, that's a different Cox document. I don't
4 understand the providence of it, and I don't recall any
5 deposition testimony from Cox as to what that document was
6 actually about.

7 So the document I used --

8 THE COURT: All right. All right. Next question.

9 BY MR. BUCKLEY: (Continuing)

10 Q. Dr. Lehr, what was the lower disconnect number in that
11 document?

12 A. I don't recall as I sit here.

13 Q. Okay.

14 A. If you pull the document, I can show you.

15 Q. But you do know that Dr. Sullivan looked at that data and
16 relied on it in his report and you looked at it too?

17 A. He cited it in his report, and I was not aware of that
18 document until I saw his report.

19 MR. BUCKLEY: Thank you, Your Honor. No further
20 questions.

21 THE COURT: All right. Redirect?

22 REDIRECT EXAMINATION

23 BY MR. WARIN:

24 Q. You were just asked questions about the 67 months that you
25 used in making your calculation as to the average duration of a

1 Cox customer?

2 A. Yes.

3 Q. I would like to have Karl pull up Exhibit PX 1515, please.

4 Could you tell us what this is.

5 A. Yes. This is the document that Mr. Negretti testified to.

6 And if you look at the bottom line it says, "Average tenure in

7 months as Cox customers," and it is going up, as I said. And

8 the number I used for 2014 was 67. It is that lower number in

9 the far right. So this is the document I relied on.

10 Q. Was this a number you calculated or is this a Cox

11 document?

12 A. This is a Cox document.

13 MR. WARIN: No further questions.

14 THE COURT: All right. May Dr. Lehr be excused?

15 MR. WARIN: Yes, Your Honor.

16 THE COURT: All right. You are excused, Dr. Lehr.

17 Thank you, sir.

18 THE WITNESS: Thank you.

19 NOTE: The witness stood down.

20 THE COURT: All right. Next witness.

21 MR. PECAU: Your Honor, BMG calls Dr. Nowlis back to
22 the stand.

23 THE COURT: Good morning.

24 THE WITNESS: Good morning.

25 STEPHEN NOWLIS, a witness recalled by counsel for the

1 plaintiff, having been previously sworn, testifies and states:

2 DIRECT EXAMINATION

3 BY MR. PECAU:

4 Q. Good morning, Dr. Nowlis.

5 A. Good morning.

6 Q. You are here to respond to certain criticisms that

7 Mr. Poret made to your Cox subscriber survey; is that right?

8 A. That is correct.

9 Q. All right. And did you do -- did you read Dr. Poret's
10 transcript concerning his criticisms?

11 A. Yes, I did.

12 Q. Did you read any other testimony in this case?

13 A. Let's see. I read Mr. Negretti's testimony, Mr. Hubert,
14 and Mr. Hauprich's testimony.

15 Q. All right. And did you look at the exhibits as well that
16 they introduced?

17 A. Yes.

18 Q. All right. Now, Mr. Poret testified how he personally
19 would respond to the questions in the Cox subscriber survey
20 that you conducted. Is this how a survey should -- expert
21 should analyze a survey?

22 MR. WAKEFIELD: Objection, leading.

23 THE COURT: It's leading. Rephrase the question.

24 MR. PECAU: Sure.

25 BY MR. PECAU: (Continuing)

1 Q. Mr. Poret testified how he personally would respond to
2 questions in the Cox subscriber survey that you conducted. Do
3 you have an opinion whether or not that is how a survey expert
4 should analyze a survey?

5 A. I do have an opinion about that.

6 Q. What's that?

7 A. Yes, I do have an opinion about that.

8 Q. Could you tell us what your opinion is.

9 A. Yes, certainly. My opinion is that that's not appropriate
10 to do it that way. The whole purpose of doing a consumer
11 survey is to find out what consumers think. So we look at what
12 the respondents think.

13 It is not appropriate for Mr. Poret to say what he
14 personally would do, just like it wouldn't be appropriate for
15 me to say how I would personally answer the question. It is
16 completely irrelevant. It is subjective. I try to take an
17 objective approach and see what the respondents themselves
18 said.

19 Q. When you say "subjective," what do you mean by that?

20 A. I mean it is subjective in the sense it is not following
21 basic survey design principles, which is what a survey expert
22 should do, is design a survey properly, analyze the responses
23 of the survey respondents, look at what they said. Not to
24 imagine what myself or Mr. Poret or any one individual would
25 say.

1 Q. All right. Did you review the research that Mr. Poret did
2 to form his criticism?

3 A. I did, yes.

4 Q. All right. Do you have any opinion about the research
5 that he did?

6 A. I do. I do, yes.

7 Q. What is your opinion on that?

8 A. Well, I remember part of what he did was he -- it was
9 quite surprising to me. He made some comments about -- you
10 know, he was testifying about BitTorrent, but he didn't do any
11 research on BitTorrent. He did not find out how people use it.
12 He didn't go to the sites that I used in my survey. He didn't
13 try to find out which of the sites were popular or not. I did
14 all of that and I took it very seriously and very carefully,
15 and Mr. Poret just completely ignored that in his approach.

16 Q. And do you have any opinion how that affected the
17 criticisms that he made of your survey?

18 A. Yes, I absolutely do. I think that, for example, when
19 Mr. Poret was criticizing one of my questions about -- that had
20 some examples or it defined the question about what BitTorrent
21 was, Mr. Poret didn't know what those sites were. He didn't
22 know that, in fact, those are the three most popular BitTorrent
23 sites out there.

24 So, therefore, somebody, a respondent seeing that
25 question would think, oh, those are popular BitTorrent sites if

1 they know -- if they use BitTorrent, they would say "yes,"
2 otherwise they wouldn't know what that means. And Mr. Poret
3 didn't even go about to try to determine that.

4 Q. And what sites are you referring to?

5 A. I am referring to the sites that were in my survey
6 question that were ThePirateBay, Kickass Torrents, and
7 Torrentz.

8 Q. All right. Now, Cox's counsel asked Mr. Poret to pretend
9 that respondents only read part of the question that was posed
10 to them. Do you have an opinion whether or not pretending a
11 question to be something other than was actually asked was
12 something that a survey expert would typically do?

13 MR. WAKEFIELD: Objection, leading, and
14 mischaracterizes the testimony.

15 THE COURT: Overruled. Go ahead and answer it if you
16 can.

17 A. Sure. I mean, right. It absolutely does not make sense
18 for a survey expert to pretend that somebody did something. It
19 doesn't make any sense. What we are supposed to do, what I
20 have a Ph.D. in, what I teach my students to do, is look at the
21 questions and see how people responded. But to go through this
22 pretend world of, well, let's pretend they did this, let's
23 pretend they did that, without any basis for any of that
24 pretending, is just completely the wrong approach.

25 BY MR. PECAU: (Continuing)

1 Q. Well, do you have an opinion whether or not Mr. Poret's
2 criticism was legitimate that a respondent would immediately
3 stop reading anything after the bolded portion of the options
4 you presented your respondents?

5 A. That is absolutely not true. I have done thousands of
6 surveys. I have analyzed thousands of surveys. This is what I
7 do for a living. And to pretend that somebody would only read
8 something in bold, it makes absolutely no sense. I have never
9 seen any study that would support this whole idea.

10 I have even seen Mr. Poret's own surveys. He bolds
11 certain things. Yes, I bold certain things. This is what
12 people do as a technique to make a survey readable. But I have
13 never seen anybody say, well, let's just assume people are
14 going to read the thing in bold and ignore everything else.
15 That's a pretend world, not the real world.

16 Q. Well, can you tell me if your survey had any controls to
17 make sure that respondents were paying attention to what they
18 were doing?

19 A. Absolutely they did. Again, we talked about this before.
20 I thought very carefully about each of my questions and I did
21 have a specific question about that. The question was -- I
22 believe it was, there is numbers below, number 1, 2, 3, and 4,
23 please click on the number 4 to continue with this survey.

24 So they had to make sure they followed that
25 instruction. If they didn't follow it, they would have been

1 terminated if they were just kind goofing around.

2 Q. All right. Did you have any other questions that
3 indicated to you whether or not respondents were paying
4 attention in responding to your survey questions?

5 A. Yes, I had a number of them. In my screener questions,
6 for example, I had a question about, well, do you subscribe to
7 an Internet service? If they said yes, they moved forward. If
8 they were just randomly clicking on things, they would have
9 been stopped because they could have said something else.

10 I had another question about do you subscribe to Cox?
11 And there were a whole bunch of other options there. If they
12 were just randomly clicking on things, they most likely would
13 have been stopped there because Cox was only one out of many
14 responses.

15 So I had many ways to make sure that the person
16 taking the survey was taking it seriously, answering the way
17 that they thought was appropriate, but not just goofing around.

18 Q. All right. And when you say "stopped," what do you mean
19 by that?

20 A. I mean if they were -- you know, for example, if they
21 didn't click on the number 4, they would have been terminated
22 from the survey. They would have ended the survey. They would
23 not have finished it. They would not have been a part of my
24 over 300 respondents that I got to the end.

25 Q. Okay. Well, what about the "don't know/unsure" options in

1 your survey? How did that fit into Mr. Poret's analysis, if
2 you know?

3 A. Well, Mr. Poret pretended I didn't even ask that in his
4 responses when he was criticizing my survey. I spent a lot of
5 careful attention having a don't know or unsure response. I
6 told the respondent, it's okay to say that, please say that if
7 you don't have an opinion. Please don't guess.

8 I had these instructions in my survey, as I do with
9 surveys, to again make sure people really have an opinion and
10 are thinking about this carefully.

11 Mr. Poret in his pretend world again just assumed --
12 just kind of ignored the fact that I did that. And I did that
13 again on purpose because that's an important principle that I
14 follow.

15 Q. All right. So does it tell you anything as a social
16 scientist and a survey expert, anything about Mr. Poret's
17 analysis that he did not refer to the don't know responses or
18 unsure responses that were a part of your questions essay
19 concerning BitTorrent usage and the main questions concerning
20 whether BitTorrent usage was a reason for Cox subscribers to
21 subscribe to Cox?

22 MR. WAKEFIELD: Objection, leading.

23 THE COURT: It is leading, and it was also really
24 confusing. So why don't you break it.

25 MR. PECAU: I guess I should do a better job.

1 THE COURT: Let's try to break it up a little bit, if
2 you would.

3 MR. PECAU: Okay. Thank you, Your Honor.

4 BY MR. PECAU: (Continuing)

5 Q. The fact that Mr. Poret was living in this pretend world
6 that you described, does that tell you anything about Poret's
7 analysis?

8 A. It tells me that he is not following social scientific
9 principles in clearly analyzing a survey. You are supposed to
10 say, oh, these are the principles, this is -- I am going to
11 analyze my survey, did I follow those principles or not. He
12 ignored the fact that I did, in fact, did respond to those
13 principles. Why would he do something like this? I was at a
14 loss to think about this.

15 I mean, I thought -- I know Mr. Poret has a law
16 degree. He does not have a Ph.D. He does not study these --
17 he doesn't have any formal training in these things. That was
18 my only thought about why he would ignore all the hard work and
19 all the things that I did objectively, and instead just live in
20 this fantasy world about things that I didn't do.

21 Q. Okay. Now, Mr. Poret spoke about the availability of free
22 copyrighted music on the Internet. In your opinion, can you
23 tell us whether or not that was in any way germane to your
24 survey?

25 A. Well, it wasn't really. And because I want to remind

1 everybody, I asked a question and I said -- I was talking about
2 downloading or uploading free digital music through sites such
3 as ThePirateBay, et cetera. These are BitTorrent sites. So I
4 wasn't just talking about free music in general. My question
5 was about free music through BitTorrent sites.

6 So just focusing on the free part without focusing on
7 the BitTorrent part, which was part of my question, it doesn't
8 make sense.

9 Q. All right. Well, let me direct you to the free music that
10 he did refer to. What evidence did Mr. Poret provide about the
11 amount and type of free music that was available on the
12 Internet?

13 A. The amount, really nothing. I mean, he didn't talk about
14 the amount of free music on the Web at all. And the type --
15 from what I recall, he talked about a couple of, you know,
16 random bands here and there that might put something on the
17 Internet for free, but the vast majority of what he referred to
18 were bands that nobody has ever really heard of.

19 Q. Now, did you actually take a look at the articles that he
20 cited to support his testimony about free music?

21 A. Yes, I looked very carefully at those articles,
22 absolutely.

23 Q. All right. Can we bring up article DTX 2361, and go to
24 page 2, please.

25 Well, let's go to page 1 first so the jury can see

1 what --

2 Is this one of the articles that Mr. Poret addressed
3 in his testimony and that you looked at?

4 A. Yes, Mr. Poret himself brought this to everybody's
5 attention.

6 Q. All right. And what does this article say about the kind
7 of music available on free sites? Is that in here anywhere?

8 A. Yes, it's on the next page. So there's a -- I can sort of
9 summarize it by the second paragraph on the second sentence.
10 Okay. So it says, "Most of the sites are void of familiar,
11 mainstream artists, such as Ed Sheeran and the infamous
12 T. Swift, Taylor Swift, but if you look in the right places,
13 you'll still probably manage to find a few select hits from a
14 couple of big names."

15 So Mr. Poret brought this out to try to support his
16 argument. But, again, if you read carefully the article, you
17 will find out it happens every now and then, but it is very
18 rare.

19 Q. All right. Now, can you tell me whether or not Mr. Poret
20 refers to any evidence that there is any significant BitTorrent
21 music traffic that is noninfringing?

22 A. He did not. Again, he sort of ignored this whole issue of
23 BitTorrent in his testimony, whereas I thought very carefully
24 about it.

25 Q. All right. Did you do any research?

1 A. I did, absolutely.

2 Q. What did you find about the amount of infringing music on
3 BitTorrent sites?

4 MR. WAKEFIELD: Your Honor, improper rebuttal,
5 nothing to do with anything Mr. Poret testified about.

6 THE COURT: Approach the bench, please.

7 NOTE: A side-bar discussion is had between the Court
8 and counsel out of the hearing of the jury as follows:

9 AT SIDE BAR

10 THE COURT: I don't remember what Poret said.

11 MR. WAKEFIELD: I think the foundation that counsel
12 just laid was Mr. Poret didn't say anything about BitTorrent
13 and whether it's -- the percentage of it that is legal, right?
14 Because he didn't talk about it at all on his direct or cross.
15 And now he is saying, but you did some other research, so
16 basically let's do a whole new direct.

17 It's not rebuttal.

18 MR. PECAU: Well, Your Honor, I mean, this is showing
19 precisely why what Mr. Poret did was ridiculous, and that why
20 the questions asked --

21 THE COURT: What can he testify that's in evidence
22 about the percentage of BitTorrent users who are downloading
23 infringing music?

24 MR. PECAU: All right. As you allowed him to testify
25 before, Your Honor, and with regard to the NetNames and

1 Envisional studies that are in evidence, that he is just going
2 to say that, you know, he did the research, he found out
3 virtually all that stuff -- that's the only question I am going
4 to ask him about this.

5 THE COURT: Okay. I am going to allow it.

6 MR. PECAU: Thank you, Your Honor.

7 MR. BUCKLEY: Thank you, Your Honor.

8 NOTE: The side-bar discussion is concluded;
9 whereupon the case continues before the jury as follows:
10 BEFORE THE JURY

11 A. What I found was there were a couple of reports that I
12 found, studies that found that almost all of the music
13 available on BitTorrent sites is infringing music.

14 BY MR. PECAU: (Continuing)

15 Q. All right. Now, can you tell us just the names of those
16 studies?

17 A. Sure. One of them -- I am trying to remember. One of
18 them was called, I think, the Envisional study, and one of them
19 was called the NetNames study.

20 Q. Okay. Thank you. Now, Mr. Poret also criticized the
21 controls that you used in your study. Do you have an opinion
22 whether his criticism was justified?

23 A. I do have an opinion.

24 Q. Can you tell us what it is.

25 A. Certainly. It's not at all justified. His criticisms of

1 my control shows to me just a lack of understanding about what
2 a control is supposed to.

3 What I did with my control is, remember, I had -- my
4 control question was part of really my main question about why
5 do people subscribe to Cox. And I found out that about
6 70 percent of people said one of the reasons they subscribe to
7 Cox is so they can download music through BitTorrent sites.
8 And I needed a control question in there to kind of measure the
9 amount of noise that could be in that response.

10 And I actually had two control questions. I wanted
11 to be very careful and very conservative in my analysis. And
12 the control questions were supposed to pick up yea saying,
13 people that would say "yes" to just about anything. I found
14 about 10 percent of people said yes to a question about avatar,
15 and three percent said yes to a question about calculating
16 radioactive decay rates. I used that as my amount of noise.
17 It is a proper approach. I subtracted it from the result of
18 people that were talking about getting music from BitTorrent,
19 and that's how I came up with my net result.

20 Q. All right. And can we look at PDX 0003 for a second,
21 please.

22 Are these the net results you are referring to,
23 Dr. Nowlis?

24 A. Yes.

25 Q. All right. And can you explain to us just quickly how

1 your control worked in these results.

2 A. Sure. So if you see the 70.4 percent, these are people
3 who use BitTorrent for free music, say, it's a reason. I took
4 out 10.8 percent. So 70.4 minus 10.8 equals 59.6. The 10.8
5 was the measure of noise that I got from looking at people
6 using avatars.

7 Q. All right. Now, I believe Mr. Poret also criticized your
8 survey because you did not compare the draw to Cox versus the
9 draw to other ISPs of downloading or uploading through
10 BitTorrent sites free music. Do you recall that testimony?

11 A. I do, yes.

12 Q. All right. And do you believe that that was a legitimate
13 criticism?

14 A. Not at all.

15 Q. And why is that?

16 A. Well, I mean, to me that tells me that Mr. Poret just
17 doesn't have a good understanding of basic marketing
18 principles.

19 Q. And why is that?

20 A. Well, I -- well, just first of all, again, you know, I'm a
21 marketing professor, I have a Ph.D. in the topic, and what is
22 an important marketing principle that Mr. Poret doesn't
23 understand? The marketing principle is what do marketers do?
24 They study consumers, they try to gain insights from people
25 about what would draw them to use their product or service.

1 So Cox would do something like this, would be to
2 measure what would cause somebody to be drawn to their Web
3 site, and then they could advertise something like this as an
4 important draw for them.

5 That's the principle that I looked at because that's
6 the standard approach in the marketing world. And the fact
7 that Mr. Poret didn't buy into that, again to me tells me he
8 doesn't understand basic marketing principles.

9 Q. Well, how is that approach reflected in your survey -- in
10 your survey?

11 A. Sure. Well, again, my key question was about a reason why
12 you would do something. A reason why you would subscribe to
13 Cox. A reason is, you know, what would draw you, what would
14 draw you to go to Cox. Which is, again, what a marketer would
15 do research to find out, what are those reasons, what are those
16 draws. And then it would use those in its advertising to, in
17 fact, try to get people to draw them.

18 Q. Well, did you see any evidence in Cox's advertising of
19 those basic marketing principles at work?

20 A. Absolutely.

21 Q. And can you tell us what they were.

22 A. I found it very, very interesting, very informative to me
23 that when I saw Cox's own advertising, they talked a lot
24 about -- really the thing they focussed on most when they were
25 talking about Internet speed was downloading music. That was

1 in their own advertising. And I noticed that there.

2 Q. Now, was there any Cox marketer that discussed why they
3 referred to downloading music in their, in Cox's advertising?

4 A. Well, Mr. Negretti testified about this. He's in charge
5 of marketing at Cox, and he did mention, he was talking about
6 the different types of advertisements that they use.

7 Q. And did he testify about the messages in Cox's advertising
8 and why they had particular messages in Cox's advertising?

9 A. Yes, from what I recall he said that they were looking for
10 highly-valued benefits, and those were the benefits that they
11 could use from their research to draw people to Cox. And
12 again, their own advertising talks about downloading music.

13 Q. All right. Now, you're referring to their downloading --
14 their advertising. Let me show you one. Let me show you
15 PX 5001.

16 A. Okay.

17 Q. And I think it's on page 5 of PX 5001. Can we go there,
18 Karl. Yes.

19 Does this Cox ad reflect the basic marketing
20 principles that you were discussing?

21 A. Absolutely. Quite amazing, in fact.

22 Q. And how does it do it?

23 A. Sure. It says, "How Will You Live the Gig Life?" They're
24 promoting this new product that they came up, its marketers
25 have new products all the time. They do research, they try to

1 find what's important to people, what would draw them to a
2 particular service. This is the service they're focus focusing
3 on.

4 And notice what it says here, it says, "download 100
5 tunes in three seconds." Again, this is Cox's own advertising.
6 And I know that marketers who come up with advertising focus on
7 message that they think would draw someone to their service.

8 Q. All right. Now, you mentioned that these messages are
9 based on the research that a company might do; is that correct?

10 A. Absolutely.

11 Q. And did you look at Cox's research?

12 A. Yes, for sure.

13 Q. And did you find any research that was consistent with
14 your results?

15 A. Absolutely, I did.

16 Q. Okay. Let's pull up PX 1404.

17 Okay. Do you recognize PX 1404?

18 MR. WAKEFIELD: Your Honor, I don't believe this was
19 cited in the expert's Rule 26 disclosures.

20 MR. PECAU: I think it is. Yes, Your Honor, it's in
21 his reply report.

22 THE COURT: All right. You may proceed. Thank you.

23 MR. PECAU: Thank you.

24 BY MR. PECAU: (Continuing)

25 Q. Let me show you PX 1404. Is this Cox research that you

1 would look at in preparing your opinions?

2 A. Yes.

3 Q. All right. And can you point to -- let's look at
4 page 1404-9. Any of these results that you are relying upon?

5 A. Yes. Very interesting. Again, just to remind everybody,
6 this is Cox's own research. They do research, marketers do
7 research. Why do they do research? They want to find out
8 what's important to people, what draws people to their service.

9 So what I found was quite interesting is you'll
10 notice that 26 percent of the respondents to their own survey
11 said that digital music obtained from friends or peer-to-peer
12 Web sites -- and I think the question is kind up above that, if
13 you could kind of go back to the question, I think you just
14 took a section out of it. Right. The Music Sources that they
15 used. Right. So for Music Sources, 26 percent use digital
16 music obtained from friends or peer-to-peer Web sites. Like
17 BitTorrent, for example.

18 Q. And why is that significant for -- in connection with the
19 research that you did?

20 A. Because it's very consistent with my results. My results
21 are finding that, yes, people do say a reason for them to
22 subscribe to Cox is the use of these P2P services like
23 BitTorrent. And here you see Cox's own research saying that
24 that's an important source of their customers.

25 Q. All right. And let's go to PX 1404-13. Is anything in

1 this, in these results that you believe are pertinent to your
2 survey?

3 A. Absolutely. So I found it quite fascinating that again
4 Cox's own research, their customers when they're talking about
5 what is important in the choice of music, that we see that
6 30 percent say facilitating music sharing through P2P sites
7 like BitTorrent. It's the same idea.

8 So again, it supports my finding that Cox's own
9 research is finding something very similar to what my own
10 finding is.

11 Q. Okay. And I'll just ask you about one more results in the
12 study. And let's go to 1404, page 51, please.

13 Now, can you tell us on this page what might be
14 significant to the results of your study?

15 A. Well, this is a really interesting result. At the top,
16 the second sentence, it says, "in addition to the acquisition
17 methods shown below, about 1 in 6, 17 percent, claim to acquire
18 methods through some free method such as downloading for free,
19 burning songs from friends' CDs, and stealing songs online."

20 Cox's own research found this, 17 percent. And it's
21 very interesting because you may recall my own results found
22 that about 16 percent, 16, 17 percent, said they engaged in
23 this type of activity. Cox's own research shows something very
24 similar.

25 Q. All right. Now, are there any other survey results that

1 you've seen cited in articles that also support your findings?

2 A. Yes.

3 Q. All right. Let's get DTX 2362.

4 And can you tell us the names, another article that
5 you read that referred to survey results?

6 A. Sure. It was this article, it's in this article, it's on
7 one of the pages from this article.

8 Q. And that was in a Billboard --

9 A. It was in a Billboard article. And do you want me to tell
10 you what it found?

11 Q. Well, why don't you tell us what it found and I'll have
12 you then identify it.

13 A. Okay. It talked about -- it mentioned other studies that
14 had been done that looked at the prevalence of people sharing
15 music on P2P services.

16 Q. And what were those specific findings?

17 A. It was about -- one study found I believe that the number
18 was 20 percent. Another study found it was 19 percent. As you
19 may recall, my study that I found said it was about 16 percent
20 of people sharing music through the P2P sites.

21 And the reason why I bring all this up and I think
22 it's very important to bring it up is it shows -- I think Mr.
23 Poret's criticisms are completely unfounded because my results
24 are supported by this other research.

25 So if people are ignoring my questions and just not

1 paying attention and just goofing around, why would I have
2 gotten a 16 percent result that's so similar to these other
3 results that have been found by other sources.

4 Q. All right. Let me show you what's been marked for
5 identification as DTX 2362. Can you tell me what this is.

6 A. Yes, this is an article from Billboard.

7 MR. PECAU: Your Honor, I offer this article into
8 evidence.

9 MR. WAKEFIELD: Objection, Your Honor, it's hearsay,
10 not an academic study.

11 THE COURT: What was the second half of your
12 objection?

13 MR. WAKEFIELD: It's not an academic study, it's just
14 an article in Billboard Magazine.

15 THE COURT: I'll sustain the objection. Let's move
16 on.

17 MR. PECAU: All right.

18 BY MR. PECAU: (Continuing)

19 Q. And so what were the results in your -- so at the bottom,
20 at the end of the day, what were the percentage of Cox
21 subscribers that you believe said that they use BitTorrent
22 sites to download free digital music?

23 A. Right. That was 16.1 percent.

24 Q. Right. And how many of those -- and what percentage of
25 all Cox subscribers believe that that was -- said that that was

1 a reason that they subscribed to Cox?

2 A. It is about 10 percent. One out of ten.

3 MR. PECAU: Pass the witness, Your Honor.

4 THE COURT: All right, thank you.

5 CROSS-EXAMINATION

6 BY MR. WAKEFIELD:

7 Q. Good afternoon, Dr. Nowlis. I don't think we've met. My
8 name is Jed Wakefield.

9 A. Hello.

10 Q. Or actually good morning, it's still morning.

11 Where should we start? Let's talk about the
12 questions themselves that Mr. Poret had discussed and you had
13 just responded to again from your survey.

14 You mentioned the use of bold, do you remember that
15 in those questions?

16 A. Yes.

17 Q. And you put those in, I believe you said, to make them
18 readable, for readability?

19 A. I, just like everybody else I've ever seen conducting a
20 survey, bold certain sections. And the reason for doing that
21 is to improve the readability of the survey, yes.

22 Q. You only put certain things in bold, right?

23 A. Certainly, that's --

24 Q. Not everything?

25 A. Sorry, go ahead.

1 Q. Not everything?

2 A. That's correct. I put certain things in -- I underline
3 certain things --

4 THE COURT: Doctor, this is cross-examination and
5 he's asking yes or no questions. And if you can answer "yes"
6 or "no," then that should be your response, please.

7 THE WITNESS: Okay. I'm sorry, Your Honor.

8 BY MR. WAKEFIELD: (Continuing)

9 Q. Okay. Have you ever heard of people putting things in
10 bold for emphasis?

11 A. Yes.

12 Q. Do you search, personally do you search for things on the
13 Internet?

14 A. Yes.

15 Q. Do you send and receive e-mail?

16 A. I do.

17 Q. Do you shop online?

18 A. Yes.

19 Q. Okay. And you were able to answer all of those questions
20 without me giving you any examples of Web sites or services
21 that you use to do those things; isn't that right?

22 A. Yes.

23 Q. Okay. And in your survey questions, those were the parts
24 that you put in bold, the look for -- the search online, the
25 shop online, the search, right? You put those parts of your

1 questions in bold, not the things that came after the words
2 "such as," correct?

3 A. Can we put them up on the screen and I can show you
4 exactly what I put in bold.

5 Q. Sure, why don't we go ahead and put your actual screen
6 shots from Appendix C. Let me just go to those real quick.
7 Here we go.

8 So let's -- this is one of the screening questions,
9 and why don't we start with this.

10 So this is your survey before you get to the
11 questions about particular Internet activities, you ask people
12 if they get certain services in their current residence,
13 correct?

14 A. Yes.

15 Q. And the first is television service, right?

16 A. On this one. They were randomized, but the one you're
17 seeing it was first.

18 Q. Right. So these might have appeared in different orders?

19 A. Yes.

20 Q. Okay. But on this screen shot the first is television
21 service, right?

22 A. Yes.

23 Q. And you put that in bold?

24 A. Yes.

25 Q. And then home telephone service, you put that part in

1 bold?

2 A. Yes.

3 Q. And magazine subscription service, you put that in bold?

4 A. Yes.

5 Q. And Internet service, you put that in bold?

6 A. Yes.

7 Q. And then after that you have a space and a dash and a
8 space, and then you say "such as," right?

9 A. Yes.

10 Q. Okay. And "such as" can mean, for instance, or for
11 example, right?

12 A. It means what it says, it says "such as."

13 Q. All right. But "such as," "such as" can mean for example?

14 A. To you? Are you asking me does it mean that to you?

15 Q. I'm asking you for your understanding of the word. Does
16 "such as" mean for example or for instance?

17 A. To me it means "such as," that's why I used those words.

18 Q. And it can't be -- there's no equivalent expression in the
19 English language in your view?

20 A. I came up with "such as" because I thought those were the
21 right words to use.

22 Q. Okay. So if someone is taking this survey and they know
23 they have TV service at their home, and they know they have a
24 home telephone service, and they know they subscribe to some
25 magazines, would they need to read your "such as" information

1 to correctly answer these with a "yes"?

2 A. When people -- when I design a question, I'm assuming
3 people read everything.

4 Q. Okay. But would they need to to understand these?

5 Let me give you an example. If someone has TV
6 service and they're asked, which of the following services, and
7 they see TV service, can't they just say "yes" correctly?

8 A. I don't know what you mean by "correctly"? Correctly is
9 up to the respondent to answer.

10 Q. Okay.

11 A. That's their answer.

12 Q. So it's up to the respondent. And if the respondent knows
13 they get TV, home phone, and magazine subscriptions and
14 Internet service, they could answer "yes" to all of these
15 without reading the examples?

16 A. Well, again, I'm assuming people read everything.

17 Q. That's your assumption?

18 A. It's not just my assumption. That's what I read, the
19 thousands of surveys I've ever seen and observed, make the same
20 assumption.

21 Q. Let's look at the magazine subscriptions example. You
22 said, such as a subscription to magazines on fashion, news,
23 interior decoration, or health," right?

24 A. Yes, I did.

25 Q. Okay. So assuming that the respondent, as you assume,

1 reads every word, if they subscribe to Dog Fancy magazine,
2 would it be a correct answer for them to say "yes"?

3 A. I'm still not sure what you mean by "correct." Again,
4 I'll just stop there. I'll stop there.

5 Q. Would you expect that a consumer who knows they subscribe
6 to a magazine, but it's Dog Fancy magazine, would say "yes, no,
7 or don't know/unsure" in response to the magazine subscription
8 service question?

9 A. I don't expect -- I expect the person to answer how he or
10 she would answer it, that's what I expect.

11 Q. Okay. So if that person would answer it by saying, "yeah,
12 Dog Fancy is a magazine," they would say "yes"?

13 A. In your hypothetical, you're saying that if they said,
14 "yes," I agree they would say "yes."

15 Q. Okay. Even though Dog Fancy is not a magazine about
16 fashion, news, interior decoration, or health?

17 A. But I think your example was I am supposed to assume they
18 said "yes," would they have said "yes," I'm saying they would
19 "yes" because you told me to assume they would say "yes."

20 Q. Okay. What would you expect a consumer to do if they
21 subscribe to Dog Fancy Magazine and they are given this
22 question about magazine subscription service?

23 A. I think you asked me this before about what do I expect
24 out of people. I expect that people read the question as it is
25 written and will answer it the way that they think is the right

1 way to answer it.

2 Q. And however they answer it would be fine, right? It
3 wouldn't matter?

4 A. Well, that's exactly why you do a survey because you are
5 looking at how respondents would answer, not how I would answer
6 it. That's why I design my surveys that way.

7 Q. If you wanted to find out if someone subscribed only to
8 fashion news, interior decoration, or health magazines as
9 opposed to something like Field & Stream or Guns & Ammo or Golf
10 or Sailing, would this be the question you would use?

11 A. I am sorry, I didn't follow that.

12 Q. If you wanted to find out if someone taking this survey
13 subscribed to a magazine that doesn't fit within the categories
14 you list in your examples, is this the kind of question you
15 would ask?

16 A. What do you mean by "doesn't fit"?

17 Q. Well, Dog Fancy is not about fashion, news, interior
18 decoration, or health, right? It's about dogs.

19 A. Okay. I understand what you are saying, yeah.

20 Q. Okay. And so, if you wanted to find out if someone got
21 magazines about fashion news, interior decoration, or health
22 specifically as opposed to other kinds of magazines, would this
23 be the question you would ask?

24 A. You mean, when my question is such as subscription to
25 these different magazines, what am I asking? Is that what you

1 are asking me?

2 Q. No. I'm asking if you would use this kind of question --

3 A. Okay.

4 Q. -- the one about magazine subscriptions, if you wanted to
5 find out if someone used a magazine, subscribed to a magazine
6 that was specifically about fashion, news, interior decoration,
7 or health.

8 A. Well, again, I said "such as" because I wanted people to
9 think about what that would mean for them.

10 I also want to point out that we are focusing in on a
11 question that doesn't have any bearing on what happens later
12 on. If they said magazine subscription, they would be
13 eliminated from the survey. So however they answer, "yes, no,
14 or I don't know," it doesn't matter to me because they would be
15 kicked out of the survey anyway. I am just bringing that up.

16 Q. I was not asking about this in terms of its effectiveness
17 as a screening question. I was asking about the pattern that
18 you built into your questions when you put parts in bold and
19 then a space and then a "such as."

20 I guess what I am getting at is, would you expect
21 people to scrutinize each example and think about the
22 relationships between those examples and use that as a limiting
23 factor on whether they subscribed to a magazine?

24 A. I would expect -- again, I think you have asked me this
25 before, but I would expect the respondent to answer the way

1 that the respondent answers when they read this question.

2 Q. Okay.

3 THE COURT: Let's move on.

4 Q. Let's move on. Why don't we go to the actual question
5 about Internet activities, this next one, on page C-11?

6 And this was, again, one of your screening questions
7 to see if people would then qualify to go into the main survey,
8 right?

9 This is the "which, if any, of the following Internet
10 activities do you personally do."

11 A. That is a screener question, that is correct.

12 Q. So in the first one, play online games, do you have any
13 opinion about whether people taking this survey would read each
14 of your examples and think about the relationship between each
15 example and use that to limit their answer to play online
16 games?

17 A. Do I have an expectation about how somebody would read
18 this question?

19 Q. Right.

20 A. I have an expectation that they would read it and
21 interpret it in the way that they thought was accurate.

22 Q. Okay. And so, if they just thought, each of these are
23 just online games, so if I play an online game, my answer is
24 "yes," that would be a legitimate answer for that person?

25 A. If they read the whole question --

1 Q. Yes.

2 A. -- and at the end of the day, after they read that
3 question with all the words to it and they knew they had a
4 "don't know" response, "unsure," if they didn't know what I was
5 talking about, and they answered it with "yes, no, or don't
6 know," that's again fine for them to answer however they would
7 answer it. That's the purpose of the survey, see how
8 respondents would answer to my questions.

9 Q. Okay. And so, if someone played an online game that is
10 different than League of Legends, World of Warcraft, or
11 Minecraft, but is nonetheless an online game, if they
12 interpreted those as examples of online games, a correct answer
13 for them would be "yes," right? They read the whole thing?

14 A. If they read it as "such as, et cetera," and it was an
15 online game that they were familiar with and they knew what the
16 question meant, then they could say "yes." That's their
17 freedom.

18 Q. All right. So in the question of "download or upload free
19 digital music" where you cite sites -- through sites such as
20 ThePirateBay, Kickass Torrents, and Torrentz, if a person
21 downloaded or uploaded free digital music through Amazon,
22 iTunes or YouTube, and saw these examples and said, well, I
23 don't use these, but I use other sites for uploading and
24 downloading free digital music, and they read your example,
25 that would be a correct answer for them to say "yes, I do,"

1 right?

2 A. No. We talked about this before. What these -- these
3 are -- this is defining the question. These are BitTorrent
4 sites. We talked a lot about this before. These are the three
5 most popular BitTorrent sites, and that's what this question is
6 about.

7 Q. Before this project, you had never heard of any of these
8 sites?

9 A. I believe that's true, but during the course of the
10 project I certainly did a lot of research.

11 Q. You had heard of iTunes from Apple Computer?

12 A. Before this research, yes.

13 Q. Yes.

14 A. I would say so, for sure.

15 Q. Apple computer is, in your words, the company with the
16 largest capitalization in the world? It is a big, successful
17 company?

18 A. I know it is big and successful. I think -- are you
19 referring to the question below which talks about iTunes, that
20 one that says "purchase digital music"?

21 Q. That was the one where you gave an example of purchasing
22 digital music, right?

23 A. Yes. It's in there, sure.

24 Q. iTunes also lets you get free digital music, doesn't it?

25 A. My understanding is it does, sure.

1 Q. Amazon let's you get free digital music, doesn't it?

2 A. Yes.

3 Q. And you didn't offer any specific question response for
4 the screening question or your test question about downloading
5 free digital music through Amazon or iTunes, did you?

6 A. I did not, because that wasn't the purpose of my survey.

7 Q. Okay. You weren't interested in whether people download
8 or upload free digital music if they do it legally?

9 A. I mean, the question I asked was do they do this through
10 BitTorrent sites. I analyze the results, and then later on I
11 look at the percentage of people using BitTorrent sites for
12 infringing music.

13 Q. Okay. Can we jump to 2361. Let's see. I think it was
14 DTX 2361. This is one of the documents you talked about today.

15 And while we are pulling that up, that was an
16 article -- sorry, we have got double numbering. Let me just
17 take that down.

18 In any event, I believe there was an article, a
19 Digital Trends article that you were asked about during your
20 examination that mentioned some sites for getting free digital
21 music. And I believe in your examination today you commented
22 on them being bands that fewer people had heard of, more
23 obscure stuff. Do you remember that.

24 A. I do.

25 Q. Okay. But one of the sites listed in the Digital Trends

1 magazine about legal, free music downloads mentioned Amazon.

2 Do you remember that?

3 A. I guess -- are you showing it to me right now?

4 Q. I am afraid I am not because we have a little technical
5 glitch. But Amazon, you would agree, is not an obscure Web
6 site, is it?

7 A. For what?

8 Q. Well, lots of people have heard of Amazon?

9 A. People have heard of Amazon, sure.

10 Q. And Amazon has ways to download movies, it has a movie
11 service, right?

12 A. To download movies? I guess. I am not sure, but I will
13 take your word for it.

14 Q. All right. Have you heard of Amazon Prime?

15 A. Yes.

16 Q. And people with Amazon Prime memberships get a bunch of
17 free movies and music if they have that annual membership in
18 the free shipping program with Amazon. Are you aware of that?

19 A. I believe that's true.

20 Q. And you have heard of Starbucks, haven't you?

21 A. Yes.

22 Q. And are you aware that Starbucks has a pick of the week
23 promotion where you get a free iTunes song?

24 A. I am not aware of that, but I take your word for it.

25 Q. Okay. I would like to talk about your choice not to do a

1 control group. In other words, not to do the same survey to
2 find out if the results would be any different for other ISPs.
3 Do you remember that? That was one of Mr. Poret's criticisms.

4 A. I do.

5 Q. All right. And you rejected that here today. Is it fair
6 to say you didn't try to find out in your research whether
7 there is any difference between how subscribers to other ISPs
8 would answer these questions?

9 A. I didn't look at differences and I explained why.

10 Q. Right. So if one wanted to know if there is anything
11 different about Cox and why people subscribe to Cox as opposed
12 to other ISPs, it would be reasonable in that case to do a
13 control for non-Cox subscribers if you wanted to find that out?

14 A. Well, I did have a control, I just want to point -- I had
15 two controls.

16 Q. Right. But you didn't control for non-Cox subscribers at
17 all, right?

18 A. I only -- my survey was focussed only on Cox subscribers.
19 That was the purpose of my survey, to look at them.

20 Q. So you have no way of knowing if the results would be any
21 different for AT&T or Verizon or Comcast?

22 A. That's true. I don't know that.

23 Q. You did mention though that there was some advertising --
24 you pointed to some recent advertising that Cox does that talks
25 about speed. Do you remember that?

1 A. Yes, absolutely.

2 Q. Did you consider the advertising that any other ISPs do?

3 A. I don't remember that coming up in Mr. Negretti's
4 testimony. I think he talked about Cox's advertising, and
5 that's what I looked at.

6 Q. Okay. You did -- and you looked specifically at
7 advertising about speed and references to downloading songs; is
8 that right?

9 A. I remember again, as I pointed out earlier, that there was
10 definitely a big mention of downloading music as a benefit to
11 subscribing to Cox that Mr. Negretti pointed out.

12 Q. And you think that supports your conclusion that people
13 are drawn to Cox Internet service by the ability to do that
14 specific thing, download songs?

15 A. Absolutely.

16 Q. Okay.

17 A. Absolutely.

18 Q. If we could get 3568.

19 Dr. Nowlis, you have in front of you --

20 MR. PECAU: Your Honor, I object to the introduction
21 of this exhibit. It has nothing to do with Dr. Nowlis'
22 testimony.

23 THE COURT: Relevance?

24 MR. PECAU: Relevance.

25 THE COURT: All right. Let's approach the side bar.

1 NOTE: A side-bar discussion is had between the Court
2 and counsel out of the hearing of the jury as follows:

3 AT SIDE BAR

4 THE COURT: Why is this relevant?

5 MR. WAKEFIELD: Okay. So first, Dr. Nowlis never
6 talked about any of the advertising that came out. And that
7 was, frankly, not even produced in discovery that Mr. Negretti
8 was asked about.

9 Now he is relying on it to say it supports his
10 conclusion because we mentioned songs and speed. And I want to
11 cross-examine him about the fact that songs are a standard
12 measurement of download capabilities by government bodies and
13 by all of Cox's competitors. And it doesn't in any way suggest
14 that Cox is uniquely trying to position itself for anything
15 illegal or unauthorized.

16 And we didn't disclose these earlier because we
17 didn't even know until-- first of all, we didn't know until
18 Negretti that these documents were going to be used in the
19 case. We didn't know that Nowlis was going to be talking about
20 them until late last night.

21 I think it's reasonable for the jury to understand
22 that there is no difference here about how other ISPs promote
23 speed, and that these are standard metrics. It's like quarter
24 mile times for cars, 0 to 60 time, we're not saying go speed,
25 it's just about the capability of the network.

1 THE COURT: Doesn't he say that he doesn't -- he
2 didn't do any investigation to see what anybody else does,
3 right?

4 MR. WAKEFIELD: But this is part of impeaching him on
5 that. That had he done this, he would have seen that there is
6 nothing unique about Cox --

7 THE COURT: You're going to impeach him on something
8 that he said he didn't know anything about?

9 MR. WAKEFIELD: Well, that he should have considered,
10 that he should have considered. Because he is saying that this
11 is gotcha evidence that we talk about speed. And we could have
12 put more in our case about that had it not been something that
13 was used -- specifically speed and songs, had it been even
14 produced in discovery, but it wasn't.

15 MR. PECAU: Your Honor, can I address that?

16 THE COURT: Yeah.

17 MR. PECAU: Okay. So there are two things that they
18 are raising. One is the evidence. We could have gone through,
19 as we did with Mr. Negretti, a number of Cox ads that are in
20 evidence. In fact, every Cox ad in evidence refers to
21 downloading music.

22 And they don't use it just as a metric. And in fact,
23 what they do use for it is exactly what Mr. Negretti testified
24 they use it for, as a messaging to drive people. This has
25 nothing to do --

1 THE COURT: It is a marketing approach.

2 MR. PECAU: Right.

3 THE COURT: So the issue then is should Mr. Wakefield
4 be able to ask him, were you aware that everybody else in the
5 industry uses speed as a marketing tool to attract customers,
6 right? Is that what you want out of this?

7 MR. WAKEFIELD: Yes.

8 MR. PECAU: This doesn't --

9 MR. WAKEFIELD: That they use speed and downloading
10 copyrighted materials, legally, but downloading music and
11 movies and books as measures of speeds.

12 THE COURT: But he doesn't know. I mean, I think the
13 first question is legitimate. You can ask him whether he knows
14 one way or the other, but I don't think you need to go further
15 than that.

16 MR. WAKEFIELD: I do think it would be fair to use
17 for impeachment on this point, to show him a couple of
18 advertisements from other ISPs.

19 THE COURT: I'm not going to allow that. Your
20 exception is noted.

21 MR. PECAU: Thank you, Your Honor.

22 MR. BUCKLEY: Thank you.

23 THE COURT: But you can him ask him that one
24 question, and you don't need the document to do that.

25 NOTE: The side-bar discussion is concluded;

1 whereupon the case continues before the jury as follows:

2 BEFORE THE JURY

3 BY MR. WAKEFIELD: (Continuing)

4 Q. Dr. Nowlis, are you aware that other ISPs, like XFINITY
5 from Comcast, Verizon, and AT&T promote their service and the
6 speed of their service by referring to downloading movies and
7 music quickly?

8 A. I can't think of a specific example of that off the top of
9 my head.

10 Q. Did you do anything in your research -- you said you
11 looked at some advertising for Cox. Did you look at whether
12 Cox's advertising is any different than other ISPs that are
13 talking about the speed and performance of their services?

14 A. I may have done that in the past, but again, nothing
15 springs to mind sitting here right now.

16 Q. Would it surprise you to know that other ISPs talk about
17 how many songs you can download in a minute or even seconds?

18 A. Do you have something for me to look at in that regard?
19 Is that what you're asking me?

20 MR. PECAU: I object. I mean --

21 THE COURT: So you don't know, is that the answer?

22 THE WITNESS: I don't know.

23 THE COURT: All right. Then let's move on.

24 MR. WAKEFIELD: Okay.

25 BY MR. WAKEFIELD: (Continuing)

1 Q. You mentioned -- at one point you mentioned sharing, and
2 you assumed that it was relating to file sharing on BitTorrent.
3 Do you remember that?

4 A. In --

5 Q. There were some documents and advertising that talked
6 about sharing?

7 A. Can you tell me which ones specifically so I make sure I'm
8 on the right page with you.

9 Q. Let me look at my notes. I think it might have been in
10 PX 1404 at 13. Can we get that.

11 Well, let me just ask you this. We don't need the
12 exhibit. Are you aware that iTunes offers sharing of music and
13 movies?

14 A. Personally am I aware of that? I don't think so. I'm not
15 saying it doesn't exist, but it does not ring a bell for me.

16 Q. And that there's a sharing option when you're using iTunes
17 so that other people in your household --

18 MR. PECAU: Objection, Your Honor, assuming facts not
19 in evidence. It's unrelated to --

20 THE COURT: I'll sustain the objection to this
21 question. You've got your exhibit now on the screen. Do you
22 want to ask any questions about it.

23 MR. WAKEFIELD: Yeah. Actually it is --

24 BY MR. WAKEFIELD: (Continuing)

25 Q. Right. So this was one of the surveys you talked about.

1 This was the percentage of people saying "a factor is important
2 in the choice to use an online music service." And you
3 mentioned specifically the reference to sharing.

4 A. I did, that is correct.

5 Q. But you're aware, aren't you, that online music services
6 allow sharing legally with people who are using the service,
7 aren't you?

8 A. You're telling me to go with the idea --

9 THE COURT: The question was, are you aware of --

10 THE WITNESS: I'm not. I'm not saying it doesn't
11 exist. I'm just not aware of it.

12 BY MR. WAKEFIELD: (Continuing)

13 Q. Okay. When you read this reference to facilitates music
14 sharing in something that people want in a choice of an online
15 music service, were you assuming that that means illegal or
16 unauthorized sharing?

17 A. Well, I know that you can share music with BitTorrent P2P
18 sites, so that's -- when I saw that, that's what comes to mind
19 for me.

20 Q. That's what comes to mind for you. This was a study about
21 a proposed deal with a company call Rhapsody. Have you heard
22 of Rhapsody?

23 A. Well, I heard about it in the context of this study.

24 Q. Did you do anything to examine whether services like
25 Rhapsody let people share their music choices with other

1 subscribers of those services?

2 A. I don't think I did, no.

3 Q. Okay. In that same document actually -- pull it back up.

4 You mentioned a 17 percent, one in six -- it's not in
5 this question, but you mentioned one in six get music for free.

6 Do you remember that part of it?

7 A. Are you reading the whole sentence right now, or are you
8 just giving me parts of it?

9 Q. It's just parts of it. Let me go to 1404. One moment.

10 So it was the page ending in 624 of this same
11 exhibit. Can we pull that up? Okay, I think we're there.

12 So you called this out in your testimony earlier
13 today about one in six of the people in this subgroup, which
14 were called the Echo Boomers, that one in six of those claim to
15 acquire music through some free method. Do you see that?

16 A. Right. And it says -- do you want me to read the whole
17 sentence?

18 Q. No, I'm just focusing you on the 17 percent, that includes
19 people who, as this survey showed, steal songs online, right?

20 A. Yeah, steal online, yes, you're right.

21 Q. It would also include people who get music through other
22 free methods?

23 A. Yes, it says, "free methods, burning songs and stealing
24 songs," that's correct.

25 Q. Okay. So you don't know that the 17 percent of this

1 subgroup of this study steal songs? You know that some amount
2 of that 17 percent does?

3 A. That is true. It fits with my earlier result, that's why
4 I was talking about it.

5 Q. It could be 80 percent of that one in six, or it could be
6 1 percent, you don't know?

7 A. That's correct, I don't know, I just know it fits with my
8 finding.

9 Q. All right. So you don't know what percent of the one in
10 six go to Starbucks and get free iTunes gift cards?

11 MR. PECAU: Objection, Your Honor.

12 THE COURT: Overruled.

13 A. I don't know that, that is correct.

14 BY MR. WAKEFIELD: (Continuing)

15 Q. You talked about your controls, your control questions
16 earlier and how you got to the 70.4 percent. Do you remember
17 that?

18 A. Yes.

19 Q. And am I correct that that was people who had said that
20 they -- people who said "yes" to the upload or download free
21 music part, and then who said that was a reason why they
22 subscribed to Cox? All right. So it was -- the 70 percent was
23 of the people who had said "yes" to that screening question
24 about free music?

25 A. I'm confused by your question. I'm sorry.

1 Q. What was the 70 percent of?

2 A. The 70 percent?

3 Q. Yes, 70.4 percent.

4 A. What was that number?

5 Q. What was it a percent of?

6 A. This was a percent of people who do the activity.

7 Q. Okay. So the people who do the activity, upload or
8 download?

9 A. Free digital music through sites such as the ThePirateBay,
10 KickassTorrents, and Torrentz.

11 Q. Okay. So the percent of those people who then went on to
12 answer the test question was, which is, is this a reason why,
13 right, 70 percent of the people said, "yes, this is a reason
14 why," right?

15 A. Right, to that question, to the final question.

16 Q. And if you take the control question on calculating
17 radioactive decay rates and you take the people who said, "yes,
18 I do that," and then you look at how many took the question
19 about is this a reason why you subscribed to Cox, what
20 percentage of those people said yes?

21 A. I am not sure I'm following you.

22 Q. Okay. Well, let's look at -- so there are people who were
23 asked to calculate radioactive decay rates, right, in the
24 screening questions?

25 A. There was a whole question there.

1 Q. Yeah, that whole question.

2 A. If you want me to reread the question, I'll do that for
3 you.

4 Q. I don't think that's necessary. Just in shorthand I'll
5 call that the radioactive decay question. We know we're
6 talking about your whole question with your examples. Okay?

7 A. Okay.

8 Q. Trying to move it along.

9 A. Sure.

10 Q. So for the -- people were asked the radioactive decay
11 question, do you do this. And if you took the people who said
12 "yes" to that question, and then you looked at how many of
13 those said "yes, this is a reason why I subscribe to Cox," what
14 percentage was that?

15 A. I'm not sure. I don't know. I don't even know if I could
16 calculate that.

17 Q. Well, it's just eight out of ten, isn't it?

18 MR. PECAU: Objection.

19 THE COURT: Overruled. This is cross-examination.

20 A. Again, I don't know. I'm not sure what you're getting at.
21 You saw my calculations that I did and I stand behind those
22 calculations.

23 Q. Let's get DTX 3576.

24 THE COURT: Mr. Wakefield, how much more do you have
25 on cross?

1 MR. WAKEFIELD: Maybe five minutes.

2 THE COURT: Okay.

3 BY MR. WAKEFIELD: (Continuing)

4 Q. Okay. Dr. Nowlis, do you have 3576 in front of you?

5 A. Yes.

6 Q. Okay. You produced data in electronic form, the results
7 of your --

8 MR. PECAU: Objection, Your Honor.

9 Q. -- survey, correct?

10 MR. PECAU: I don't believe we were given a copy of
11 this beforehand. Were we?

12 THE COURT: When, this morning?

13 MR. PECAU: Anytime, ever.

14 THE COURT: All right, approach the bench, please.

15 Ladies and gentlemen, let's take about a ten-minute
16 recess now.

17 NOTE: At this point the jury leaves the courtroom;
18 whereupon the case continues as follows:

19 JURY OUT

20 THE COURT: So the objection is this is a document
21 that he hadn't seen?

22 MR. WAKEFIELD: It's his own spreadsheet. It's just
23 drilling down into what has been produced electronically. It's
24 his own data, and we just sorted it by the people who said
25 "yes."

1 MR. PECAU: Well --

2 THE COURT: Do you recognize the data in here,
3 Dr. Nowlis?

4 THE WITNESS: Not necessarily in this format. I
5 believe that he did submit -- additional analysis was done on
6 this, which I never did, and I couldn't verify it at this
7 point.

8 MR. PECAU: Your Honor, this is precisely what they
9 did with their own expert, Mr. Poret. I mean --

10 THE COURT: All right, the objection is sustained.

11 MR. WAKEFIELD: So, Your Honor, I don't have to use a
12 new document, I can just ask him to walk through. He came here
13 in rebuttal and said, again, that there was this 70 percent
14 result. And I think it's fair to say what results he gets
15 applying that methodology to the control questions if he did it
16 the same way.

17 And I have -- we can pull up the spreadsheet
18 electronically and he can look at it as he produced it to us as
19 well. But I think it's fair impeachment, Your Honor.

20 MR. PECAU: Your Honor, can I address that?

21 THE COURT: Yes.

22 MR. PECAU: Your Honor, it isn't fair impeachment.
23 And the reason it isn't fair impeachment is because all
24 Dr. Nowlis testified to is how the control worked in the
25 question that he asked.

1 This has nothing to do with the question he asked or
2 the control that he used. This is something completely
3 different, which was never disclosed in their expert report.
4 And this is just trying -- this isn't fair cross-examination.
5 I mean, he hasn't -- Dr. Nowlis hasn't analyzed his survey
6 results, which are quite voluminous, to look at it in a
7 completely different way. And to have him to do it on the fly
8 and to rely on Mr. Poret's calculations is completely unfair.

9 THE COURT: All right. Mr. Wakefield.

10 MR. WAKEFIELD: So, Your Honor, I don't think it's --
11 he just, again, said, I took the number of people who said they
12 do that activity, and then I figured out how many of them said
13 "yes" to the question. And I'm just walking him through the
14 fact that if you did that with his people who were asked about
15 decay rates and avatars, that the percentages would be about
16 the same or higher.

17 THE COURT: All right. The same ruling as I had last
18 week, this will be excluded. And your exception is noted.

19 MR. WAKEFIELD: Thank you, Your Honor.

20 THE COURT: All right, let's take ten minutes.

21 NOTE: At this point a recess is taken; at the
22 conclusion of which the case continues in the absence of the
23 jury as follows:

24 JURY OUT

25 THE COURT: All right. Let's get our jury, Joe.

1 JURY IN

2 THE COURT: All right. Please be seated.

3 Mr. Wakefield?

4 MR. WAKEFIELD: Thank you, Your Honor.

5 Q. Dr. Nowlis, I only have one further question -- well,
6 perhaps two: Your survey ultimately was getting at whether the
7 ability to upload and download free music through particular
8 BitTorrent sites was a draw to Cox's Internet service, right?
9 It was about BitTorrent?

10 A. It was about BitTorrent, yes.

11 Q. Okay. And nowhere in this survey did you use the word
12 "BitTorrent" in any of your questions, correct?

13 A. Yes.

14 MR. WAKEFIELD: Okay. Thank you.

15 THE COURT: All right. Redirect?

16 MR. PECAU: Just a couple of questions, Your Honor.

17 REDIRECT EXAMINATION

18 BY MR. PECAU:

19 Q. Dr. Nowlis, as a marketing expert, if a person pays for a
20 membership like Amazon Prime, do you have an opinion whether or
21 not that person is getting the services that come with his
22 membership for free?

23 A. You said if someone subscribes to Amazon Prime, would they
24 get things for free as part of that membership?

25 Q. Yeah, if they're paying for it.

1 A. Well, then it's not free, because if they're paying a
2 certain fee for it, it's not technically free.

3 Q. Okay. And your main question asked the respondents, you
4 know, which, if any, of the following are reasons that you
5 subscribe to Cox, why you subscribe to Cox Internet service,
6 and the main option was, that we've been talking about,
7 download or upload free digital music through sites such as
8 ThePirateBay, Kickass Torrents, and Torrentz, et cetera.

9 Do you recall that?

10 A. Yes.

11 Q. All right. Do you know if someone can upload through
12 Amazon or iTunes music?

13 A. I don't believe they can.

14 MR. PECAU: Okay. No further questions, Your Honor.

15 THE COURT: All right.

16 MR. WAKEFIELD: One recross?

17 THE COURT: No, we're done.

18 All right. Thank you, sir. You're done and excused.
19 Have a good day.

20 THE WITNESS: Thank you, Your Honor.

21 (Witness excused.)

22 THE COURT: All right. Next witness?

23 MR. CARACAPPA: Thank you, Your Honor. BMG calls
24 Dr. Robert Bardwell.

25 THE COURT: Go ahead.

1 ROBERT BARDWELL, PH.D., PLAINTIFF'S WITNESS,
2 PREVIOUSLY SWORN, RECALLED
3 DIRECT EXAMINATION

4 BY MR. CARACAPPA:

5 Q. Dr. Bardwell, good afternoon. How are you?

6 A. Good afternoon, Mr. Caracappa.

7 Q. Dr. Bardwell, did you read Dr. Sullivan's testimony?

8 A. I did.

9 Q. Did you feel that Dr. Sullivan properly represented to the
10 jury your model or your analysis?

11 A. Absolutely not.

12 Q. Dr. Sullivan was qualified as an expert in statistics. Do
13 you recall that?

14 A. I do.

15 Q. Do you recall whether he was declared as an expert in
16 probability?

17 A. He was not.

18 Q. And you were declared as both an expert in statistics and
19 probability, correct?

20 A. That's correct.

21 Q. And how, if at all, is that relevant here?

22 A. Well, it's extremely relevant. The model that I prepared
23 and, in fact, the only model that could be prepared in this
24 case is a probability model, and throughout his testimony and
25 his reports, Dr. Sullivan only opines about my model as if it's

1 a statistical model and, as such, misrepresents it or
2 misunderstands it.

3 Q. Can you please explain the differences between a
4 statistical model and a probability model?

5 A. Yes. So a probability model is -- has to be applied and
6 is typically applied when you don't have data that addresses
7 the outcome in question. So a good example is, say, when I
8 analyzed the first Colorado lottery. They had essentially a
9 Powerball lottery. You don't have outcomes of multiple
10 lotteries at the time. It was the first lottery in the state.

11 What you need to do -- what you have to do is build a
12 probability model that lets you predict the results, because my
13 job is to ensure that the state doesn't lose money by paying
14 out too much and people who participate in the lottery don't --
15 you know, get a fair shake in terms of their winnings.

16 So, for instance, in that, I think it was a five-ball
17 Powerball lottery, I can compute that there's one ticket in
18 5,006,386, I think, will be a winning ticket. So using --
19 that's with no data. Actually, there's some data there in that
20 there is the design of the game. So there's information about
21 how the game is designed. There's 1 through 59 on each of the
22 balls. There are five balls. So you have that data that
23 designs the lottery, but you don't have any experimental data.
24 But you can build a probability model that will tell you the
25 outcome.

1 Q. Dr. Sullivan used some examples of the cost of houses. Do
2 you recall that?

3 A. I do.

4 Q. Do those examples have any applicability here?

5 A. None whatsoever in the way that he tried to apply them.
6 So his model is something like we look at house prices in an
7 area. We investigate the relationship of those house prices to
8 different characteristics of houses, square footage and so
9 forth, and then we could build a model, and that's what
10 economists often do and statisticians. We could build a model
11 that would allow us to estimate the house -- the price of a
12 house with those given characteristics.

13 There's a big difference there, though, because in
14 that case, you have data about house prices, the outcomes in
15 question. You build a model, and then you can apply it to
16 members of that area -- houses in that area.

17 In this case and in the lottery case, we don't have
18 that kind of data. In this case, we don't have data showing
19 the subscribership to IP addresses over time that would allow
20 us to verify that those are repeat infringements on those
21 accounts.

22 Q. Now, you did have data for 122 Cox subscribers, right?

23 A. That's right.

24 Q. We'll talk about that later, but you didn't have the data
25 for the other over 100,000 Cox subscribers that have been

1 accused of infringing, right?

2 A. That's correct.

3 Q. And the point of your probability model was to do what?

4 A. Well, if we had had the data, if Cox had been able to
5 produce the data that would verify the assignment of IP
6 addresses to subscribers over time, there would be no need for
7 a probability model. That data itself would tell you if these
8 are repeat infringements by single subscribers.

9 Q. We were talking about this yesterday, and I was trying to
10 understand the difference between a statistician and a
11 probabilist, which is someone who is an expert in
12 probabilities, right?

13 A. Yes.

14 Q. One example we used was flipping a coin. Let's say we
15 have a fair coin. What does a fair coin mean?

16 A. You know, so we're all familiar with this. So we have a
17 coin with a head on one side and a tail on the other, and
18 they're used even at the start of football games, right? You
19 flip it. You -- the assumption is they'll be 50 percent in the
20 long run, 50 percent heads and 50 percent tails.

21 Q. Let's say I take that coin and I flip it ten times and all
22 ten times there's a head. What would a statistician say is
23 going to be on the eleventh flip?

24 A. Yeah. So taking Dr. Sullivan's approach, we would say
25 that the average occurrence of a head is 100 percent, so we

1 would expect the next flip to be 100 percent heads.

2 Q. And what would someone who is an expert in probability
3 say?

4 A. All of us would say if we know that it's a coin with a
5 head and a tail, we would flip it the next time, and we would
6 say it has 50 percent chance coming up heads and 50 percent
7 chance coming up tails.

8 Q. Dr. Bardwell, Dr. Sullivan testified that you created a
9 statistical model to identify Cox subscribers. Do you recall
10 reading that?

11 A. I do.

12 Q. Is that correct?

13 A. It's not correct at all.

14 Q. Can you please explain?

15 A. Yeah. I think of the -- a really good example of a case
16 that's similar to this, very similar, and has -- it maybe is a
17 little bit easier to understand because we have lots of
18 Internet technology going on as well as the probability theory,
19 but the murder case that I worked on in, for Boulder. That was
20 a cold case that was reopened on the basis of a probability
21 model I built, and that case is very similar to the data and
22 the model that I built in this case.

23 In that case, there were 30 pellets from a shotgun
24 shell that were found on the body of the victim, and there was
25 a shotgun shell found in the vest, hunting vest of the suspect,

1 and the FBI took pellets from each of those sources and did a
2 chemical analysis on them to determine was there a
3 characteristic fingerprint or signature in the distribution of
4 the different metals in the pellets from the murder scene and
5 the pellets that were found on the suspect.

6 And so this -- and it's very similar here because
7 here we have a signature that's defined by port, songs that are
8 shared, the pattern of sharing over time, and in that case, we
9 had distribution of metals. So they had, I believe, there were
10 eight metals, but lead, tin, silver, antimony, bismuth, copper,
11 arsenic, I believe.

12 And what I showed is that -- and in this case -- in
13 that case, the only model that one could construct is, that had
14 any validity is a probability model because the only data that
15 would answer the question is a confession, and the question is,
16 is the suspect guilty? Are these shells -- is the shell at the
17 murder scene and the shell on the suspect the same, from the
18 same source?

19 And by the -- by creating a probability model, I
20 could show that there was a very remote chance that these two
21 shells did not come from the same source.

22 Q. Did Dr. Sullivan talk about probability models at all?

23 A. He did not.

24 Q. Did Dr. Sullivan prepare a probability model?

25 A. You know, Dr. Sullivan in everything that he's produced

1 did no analysis of any data, prepared no model, probabilistic
2 or statistical, did no analysis. I mean, all he's testified to
3 and presented is his eyeballing of my exhibits and telling us
4 that they don't look to him like repeat infringements.

5 Q. He has a number of criticisms of you and your models.
6 First he says that all the factors, you treated them all
7 independently. Do you recall that testimony?

8 A. I do.

9 Q. And is that true?

10 A. You know, it's always a difficult -- I mean, I have the
11 curse of being a mathematician, and I often put people to sleep
12 or it's -- it's a hard field to give people any confidence that
13 I'm making sense, but the fact is he's right in one sense. You
14 need to use conditional probabilities in a Markov model, and I
15 can show you a little bit of what that means, but he's
16 completely wrong in his statement and his claim that I applied
17 incorrectly and treat the probabilities as independent.

18 So I, you know, if you -- my derivation of the Markov
19 model is from the very first to the last, it's a derivation of
20 conditional probabilities.

21 Q. Karl, can you pull up PX 1640, please?

22 Dr. Bardwell, how, if at all, does this relate to
23 Dr. Sullivan's criticisms of the factors you analyzed?

24 A. Well, I'll do, try to do a little bit of interpreting.
25 I'm not expecting people to digest it. This is the document

1 that presents the derivation of the mathematics behind my
2 model, but you can see that the very first, the title of the
3 document is formulas for -- and I'll just read it as a
4 mathematician would read it -- formulas for the probability,
5 that's what the P means, that we have the same subscriber
6 between two infringements, and the bar, that pipe, that
7 vertical line means conditioned on.

8 This is a -- this is -- the whole derivation here is
9 conditional probabilities -- conditioned on that the gap
10 between two infringements is t days, and the plus or minus just
11 means we either do or we don't have the same port and we either
12 do or we don't have the same songs.

13 And if we could just page through here, there's only
14 three pages, these are the computations -- the second page is
15 the computation of the transition probabilities, and then on
16 the third page, we have the results, and you can see in the
17 middle there, those are the results. So this is the four
18 probabilities we were trying to compute.

19 And this is, this is actually, if you look at my
20 computer code, I can show you where this is. We just calculate
21 this for all almost 2 million records in that data set. We
22 say, well, what's the probability between this infringement and
23 the next one that it was the same subscriber or not given that
24 they had the same music and the same port or if they didn't,
25 and given that the space between the two infringements was

1 t days apart.

2 MR. CARACAPPA: Your Honor, at this time, we'd like
3 to move into evidence PX 1640.

4 THE COURT: Any objection?

5 MR. WAKEFIELD: No objection.

6 THE COURT: It's received.

7 BY MR. CARACAPPA:

8 Q. Dr. Bardwell, Dr. Sullivan also criticizes you for not
9 having an error rate. Do you recall that criticism?

10 A. I do.

11 Q. Do you agree with that criticism?

12 A. No. I -- and I think it's alarming to me that he says
13 that, as he must, as he represents himself as an expert, must
14 know that we've done -- I've presented at least three different
15 analyses of error and done a very thorough job of that, and he
16 has done no analysis at all.

17 Q. Karl, can you pull up PDX 6, slide 1, please?

18 Dr. Bardwell, how, if at all, does this relate to
19 your error rate?

20 A. So I submitted an initial report, and Dr. Sullivan
21 responded to it, and he made some suggestions and changes in my
22 parameter estimation method and in the model. And so then I
23 authored a reply report which was backed with a lot of analyses
24 that we submitted detailed documentation of, including the
25 code, and this is the summary table from the reply report.

1 So -- and basically -- so basically the reply report
2 is all about errors, controlling and measuring the sensitivity
3 of the results of the model to the changes that Dr. Sullivan
4 suggested in his report.

5 So the first two columns, which have the title
6 Bardwell Report, show the results from my initial report, and
7 just to cut to the chase, the conclusion is that 95 percent of
8 the infringements are found to be in verified accounts. In
9 other words, they're shown to be repeat infringements by one
10 subscriber.

11 The other two groups of columns, the Revised
12 Parameters and Conservative Model, are both what a
13 mathematician would call a sensitivity analysis to understand
14 how sensitive the findings of the model are to changes in the
15 model. So Dr. Sullivan suggested we make some changes -- I
16 make some changes in how I estimated parameters. That model
17 with those revised parameter estimates are presented in the
18 middle two columns, and they -- those changes actually
19 increased the percent of verified accounts by 1 percent, so
20 from 95 to 96 percent.

21 And then finally, Dr. Sullivan suggested some changes
22 to the structure of the model, which I don't agree are
23 appropriate, but it's good to test those things to make sure
24 the model is robust. That's another -- I love that term. It
25 means, hey, you've got a piece of mathematics that's going to

1 give you the right answer even if a lot of things -- even if
2 you don't have a lot of things quite right or some things are
3 changed.

4 So here we try a really pretty radical test of the
5 model, restructuring it and using the revised parameters, and
6 it only lowers the percentage of verified infringements 4
7 percent, to 91 percent.

8 Q. So if I understand you correctly, you prepared three
9 models, and they all came in with around the same percentage:
10 95, 96, and 91, right?

11 A. That's correct.

12 Q. Dr. Bardwell, Dr. Sullivan also says that you assumed
13 conclusions and then prepared a model that forced the results.
14 Do you recall that testimony?

15 A. I do.

16 Q. And do you agree with it?

17 A. No. And I think it's egregious that he characterizes it
18 that way, because he has all the documentation in our code and
19 in the data and all of the results we have that show the
20 methodical process of a data-driven analysis. This was a
21 scientific investigation of the data to determine whether we
22 could verify repeat infringements, and there was no way in
23 which it was driven -- I mean, he never points out how it could
24 have been driven by attempting to change the results or aim for
25 certain results.

1 Q. Dr. Sullivan then says that your software doesn't work.
2 Do you recall reading that testimony?

3 A. I do.

4 Q. Do you agree with that testimony?

5 A. No. And again, I really find his testimony alarming,
6 because I -- you know, you have to decide, and there's two
7 experts, but frankly, it's a tremendous fabrication.

8 Q. Can you please explain?

9 A. Yeah. I mean, I own a software -- my other business is a
10 software development firm. I work with 10 to 20 software
11 developers all the time, designing projects, monitoring those
12 projects, we have sophisticated tracking systems. I mean, this
13 is my life.

14 And we routinely, we have to produce reproducible
15 code with our projects, and we did that, and Dr. Sullivan's
16 initial report said, well, he couldn't run the code. We went
17 through, to great lengths testing and retesting that the code
18 ran without any problems.

19 After he continued to make those claims, we actually
20 took the exact same package of code and data that we provided
21 to Dr. Sullivan and gave it to two analysts on our team who
22 have nothing to do with this project, no other instructions.
23 Both of them came back in -- it takes over two hours to run the
24 software, but in a few hours, having been able to run the
25 code --

1 MR. WAKEFIELD: Objection, Your Honor.

2 THE COURT: I'm sorry, there's an objection.

3 MR. WAKEFIELD: None of this new analysis was
4 disclosed.

5 THE COURT: Overruled.

6 Go ahead, finish your answer.

7 THE WITNESS: So those were independent -- I mean, I
8 was concerned, and frankly, you know, anybody who uses a
9 computer knows software is a complicated environment, and it's
10 prone to error.

11 So we're very error -- we're very conscious about any
12 kind of flaws that could exist in our software, so that was
13 just to double-check, and that really indicates to me that -- I
14 don't know what to say. I can't understand why someone who
15 represents himself and his company to be of the caliber
16 Dr. Sullivan does can't run code that's easily runnable and
17 doesn't ask, if he can't run the code and he wants to, why
18 didn't he contact us? We could have helped him set it up very
19 quickly.

20 THE COURT: Next question.

21 MR. CARACAPPA: Karl, could you pull up PX 1772?

22 Q. Dr. Bardwell, what is PX 1772?

23 A. Well, this is the first page of the initial -- the code
24 that was paired and submitted with my initial report.

25 Q. Karl, let's blow up that stamp.

1 Dr. Bardwell, do you know whether this code was used
2 at your deposition?

3 A. It was presented there as an exhibit, yeah.

4 Q. Did they ever ask you questions about how to run the code?

5 A. No.

6 Q. Did they ever say, we can't run it. Can you step us
7 through it because we don't know how it works?

8 A. No. No, they did not.

9 Q. The analysts that you had run the code to confirm that it,
10 in fact, worked, did they get it to work?

11 A. Immediately.

12 Q. Dr. Sullivan says that you're utilizing unreliable data.
13 Do you recall that?

14 A. Yeah, I do.

15 Q. Is that criticism warranted?

16 A. No. Again, Dr. Sullivan doesn't provide any explanation
17 of what he means by that, but I would think if --

18 THE COURT: Okay. Wait for the next question.

19 THE WITNESS: Thank you.

20 BY MR. CARACAPPA:

21 Q. Could you please explain?

22 A. Yeah. The data that -- I mentioned this before. This is
23 an exceptionally rich, a large and consistent data set. It's
24 computer-generated. I've dealt with, you know, hundreds of
25 data sets, and I have never encountered one that was this --

1 took this little work to get, to prepare and to be able to deal
2 with.

3 And I -- you know, my father, I said, was a
4 statistician, and when I got my Ph.D., he said, much to my
5 chagrin, that I'm going to spend 95 percent of my time
6 preparing the data, which I didn't think sounded very
7 glamorous, but that's absolutely the case. 95 percent of what
8 we do is getting rid of outliers, cleaning data, mapping
9 fields, so that things are reliable enough so when you analyze
10 things, you don't have garbage in and you get good results.

11 This data, as I mentioned before, we had to delete a
12 few duplicates. There's no other code that had to be written
13 to clean this data. So it really is the most exceptional data
14 set I've seen.

15 Q. Dr. Sullivan then says that the model was statistically
16 biased. Do you recall reading that testimony?

17 A. I do.

18 Q. Do you agree?

19 A. No. And again, I find this really alarming, because
20 "bias" is a technical term. It sounds like the guy knows what
21 he's talking about, but bias -- so bias means, for a
22 statistician, that's a term of art, so it means that the data
23 has a characteristic that it will not give you the correct
24 answer. It will give you an answer that's a little bit too
25 high or a lot too high or a little bit too low, whereas we

1 assume that if we -- and that averages tend to be correct in
2 the long run, that's the way science is, most statistics is
3 built, is that it assumes that we have unbiased data.

4 And so Dr. Sullivan makes this claim about the data.
5 He doesn't explain what he means by that or why that would
6 occur.

7 And if I were to -- I tried to think about what could
8 he mean, and so maybe we have the Rightscorp program is
9 selectively just picking infringements, where the songs are the
10 same and the ports are the same, to give the illusion that
11 these are repeat infringements when they're not.

12 But all of the examples that Dr. Sullivan presents
13 belie that manipulation because they're all examples of how
14 scattered the song distributions are and how much other things
15 change.

16 So, you know, if Rightscorp was trying to cook the
17 books, they did a pretty lousy job of it.

18 Q. I'm going to get to some of Dr. Sullivan's slides in a
19 minute, but I'd like to ask you just a couple more questions.
20 Dr. Sullivan said that you did not use a scientific model. Do
21 you recall reading that testimony?

22 A. I do.

23 Q. Is the model that you used a scientific model?

24 A. Yeah. In the context of Dr. Sullivan did no analysis,
25 presented no model except for his eyeballing of the data, you

1 know, we spent, I think, over a thousand hours examining the
2 data. This was a very data-driven -- first, it was
3 research-driven. We researched how the Internet file sharing
4 works.

5 We built a model, you know, in the -- in every
6 project, a probability model has to start this way. With the
7 shotgun shell evidence, they flew me to Winchester's factory to
8 see how shot shells were produced so I could create a model, a
9 reliable model about how do these different alloys get mixed up
10 in pellets.

11 So we studied the Internet; we built a model; then we
12 ran the data. We looked at the data and the results, and we
13 continually improved the model so that it was more faithful to
14 the Internet file sharing we're observing.

15 So it's the picture of scientific method. That's
16 where you have a hypothesis, you build a model, you test it,
17 then you adjust it so that it's a better representation of
18 reality.

19 Q. Karl, let's pull up PDX 6, please.

20 Dr. Bardwell, I'd like to show you an exhibit that
21 Dr. Sullivan used. Do you recall this exhibit?

22 A. I do.

23 Q. Do you think that this is a fair presentation of the
24 evidence in this case?

25 A. No, I do not.

1 Q. Please explain.

2 A. So this chart is a record of file sharing by this single
3 IP address that's listed in the header, and each row represents
4 a date on which files were shared, and each column represents a
5 different song that was shared, and this data was produced to
6 Dr. Sullivan in one of the exhibits in my original report, and
7 he -- his presentation in his report and at trial was that the
8 pattern, he just kind of eyeballs it and he discusses that the
9 pattern there doesn't look to him like it should be repeat
10 infringements on one, by one subscriber, and in spite of the
11 fact that my -- and he says my model is unreliable because my
12 model verified this as a single subscriber account, but one of
13 the things -- there's two really misleading things about this.

14 One is the way it's presented is visually intended to
15 imply that there's kind of random file sharing, which is not
16 the case, as I'll demonstrate, but what's the most concerning
17 to me is I devoted a whole page in my reply report to explain
18 to Dr. Sullivan why this example, which he says doesn't look
19 like it should be a repeat subscriber, is, you know,
20 mathematically very clear that it is, because the port that was
21 used throughout all of these is so rare that it constitutes a
22 very unique fingerprint for every one of these sharing events.

23 And he doesn't -- he didn't present that at trial.
24 He just presented testimony, ah, it looks messy, and
25 Dr. Bardwell decides it's one subscriber. He doesn't mention

1 that every one of these events has a fingerprint that almost
2 uniquely identifies it.

3 But moreover, even the data that he did present on
4 the song distribution is misleading because he looks like, oh,
5 gee, they just kind of randomly pick songs, but if you really
6 look at this in the context of all songs, this person is just
7 sharing 35 out of over 11,000 songs. So in reality, if I look
8 at the whole range of songs, which is what is intended to be on
9 the width of the chart now, we see that all of these events are
10 in a very few of those 11,000 songs.

11 Q. So over time then from 9/21/2013 to 3/13/2014, this single
12 account is sharing these same songs over and over and over
13 again; is that right?

14 A. That's correct.

15 Q. And that's what this document is attempting to
16 demonstrate?

17 A. Right. And so it shows that not only is the port
18 extremely rare, but among all songs, this collection of songs
19 this person is -- or this account is sharing is also very
20 distinctive.

21 Q. I think you said Dr. Sullivan used this to show to the
22 jury that this was random; is that right?

23 A. Yeah. He wanted to say my model said -- he says it's
24 obvious my model is unreliable because it verifies this as an
25 account with repeat infringements, when, in fact, we can see

1 that the sharing is erratic.

2 Q. Let's arrange them by song.

3 A. So the other pattern in addition to that, it's a very
4 select group of songs, it's a very rare port, in addition, when
5 we group them by song, we can see that this person is sharing a
6 whole group of songs by Frank Ocean, on three days songs by
7 Kanye West, two days a group of songs by Bruno Mars, and so
8 forth.

9 So there you see that, in fact, even underneath the
10 changes in the song profile, there is consistency.

11 Q. And the red just represents the instances that Rightscorp
12 detects the sharing; is that right?

13 A. Yes. So each of these red blocks, that is equivalent to
14 one row in the Rightscorp data. When I get to that row, I say,
15 okay, that's this song by Frank Ocean shared on 11/11/2013, and
16 I fill in that red block, or that's the result of the data that
17 I gave -- produced to Dr. Sullivan on this account.

18 Q. What does the white represent?

19 A. Well, the white, it represents the absence of a record in
20 the Rightscorp data. It doesn't represent an absence of that
21 song being shared. So we don't know on 11 /16 whether those
22 same Frank Ocean songs were shared or whether the Rightscorp
23 data just didn't pull that torrent that day.

24 So what we do know is the songs were offered for
25 sharing on these days. What we don't know is how many other

1 days how many other songs were also offered for sharing.

2 Q. Did Dr. Sullivan do the same type of thing with respect to
3 IP address 184.179.78.208?

4 A. Yes. And so -- and this again was a -- this data came
5 from an exhibit that I produced with my original report, and
6 Dr. Sullivan again in his report said, oh, this is another
7 example of why Dr. Bardwell's model is unreliable, because he
8 verifies this account and it obviously shouldn't be verified.

9 But -- and he -- and I again responded with almost a
10 page-long description of why it is and should be verified using
11 the Markov model, which as a statistician, he should have
12 understood, but he failed to mention, I believe, in his
13 testimony the most crucial thing, that this was also a unique,
14 very unique port. This port only -- the chance of another
15 subscriber getting this port and sharing music is less than 16
16 in a million. So it's such a unique fingerprint -- that port's
17 fingerprint is on every one of these events.

18 Q. Let's look at the number of songs being shared by this IP
19 address on this port in the context of all the potential.

20 A. Right. So that -- there are 66 songs, again, out of the
21 total 11,000 songs. That, in addition to the port, is also a
22 characteristic fingerprint of this sharing history that links
23 these events.

24 Q. So this is the same IP address on the same port sharing
25 these same songs from 2/7/2013 to 2/19/2015, almost two years,

1 right?

2 A. Right.

3 Q. Thank you.

4 A. Yes. This was -- this example was presented as one of
5 the -- I believe it was the account with the longest history of
6 sharing.

7 Q. And let's also look at the songs arranged by song. It
8 looks a lot less random.

9 A. By artist, yes. So we have the Beatles on four days, a
10 whole -- the same set of songs. Similarly, on eight days,
11 there's a series of songs by the Black Eyed Peas, and so forth.
12 So arranged this way, it's much clearer that this is consistent
13 with one person sharing a library of -- their library of music
14 than it would be for a bunch of people sharing libraries of
15 music.

16 Q. Just so we're clear, according to this document,
17 Rightscorp detected that the person at this IP address was
18 sharing these Beatles songs on 6/26/2013, right?

19 A. That's correct.

20 Q. And then it detected that they were those same songs again
21 on 1/31/2014?

22 A. Correct.

23 Q. And again on 2/20/2014?

24 A. Correct.

25 Q. And 5/6/2014?

1 A. Correct.

2 Q. Let's talk a little bit about some of the charts that
3 Dr. Sullivan used with respect to the 122 subscribers, okay?

4 A. Very good.

5 Q. We talked earlier about how you didn't have any data and
6 that's why you had to build your probability model. Do you
7 recall that?

8 A. Right. I just want to be clear. The reason -- part of
9 the reason I brought up the shotgun shell case is because,
10 obviously, I did have some data, right? I had the Rightscorp
11 data, but it's important that the Rightscorp data does not tell
12 us the -- who is the subscriber on an account. That's the
13 question at hand.

14 Just like the shotgun shell data, I had data, I had a
15 lot of data from the FBI about the composition of these pellets
16 from the murder scene and the suspect, but that didn't tell me
17 if he was -- guilt or innocence. It didn't tell me whether
18 those two shells should be matched.

19 So in the same way, we have data about the behavior
20 of these infringements that will help us tell whether they're a
21 match, but we don't have that key piece of evidence which could
22 make it a statistical model. Do we have the account
23 assignments for subscribers? We don't.

24 Q. Do you know who would have that information?

25 A. Except for this 122.

1 Q. Do you know who would have the information with respect to
2 the Cox subscribers? Do you know who would be associated with
3 a particular IP address?

4 A. Well, obviously, at some point, Cox knows because they
5 bill their subscribers.

6 Q. Thank you.

7 So let's take a look at the selection of the 122
8 pieces of data that Dr. Sullivan focuses on first, all right?

9 A. Um-hum.

10 Q. He selects out, I think, 10 of those 122 here?

11 A. Yes.

12 Q. And then he selects out more of the 122 here?

13 A. Yeah. There's 11 here, um-hum.

14 Q. And then more, right?

15 A. That's correct. And his demonstration that -- what he's
16 trying to convince the fact finders of is that my model is
17 inconsistent, because in the first slide, the revised model
18 actually verified those accounts -- if we could go back one
19 more? Could we go to -- yeah.

20 So in this -- the first slide, he's saying, okay, the
21 black bar is above the 95 percent. So the revised model
22 verified all those accounts, and my conservative model didn't.

23 Well, that's not really a surprise. The conservative
24 model was meant to be conservative. It was built to see, gee,
25 how low could we be? If we really wanted to guard against any

1 potential errors we might make, we still got 91 percent
2 verified accounts, but how did we get a lower amount? Some
3 weren't verified that were previously verified.

4 Does that mean that -- I just want to be really
5 clear. When we don't verify an account, that doesn't mean
6 we're saying the account is not a repeat infringing account.
7 That's not at all what it's saying. It's just saying that the
8 evidence, the pattern in the data is not strong enough to give
9 us a 95, a very high threshold, a 95 percent probability that
10 we can verify the account. So we're not wrong when we don't
11 verify an account; we're just conservative.

12 So if you use my number of 91 to 96 percent verified
13 accounts, you can be assured that that's a conservative, i.e.,
14 lower than the actual number.

15 Q. We talked about the 60,000 of verified accounts, right?

16 A. That's correct.

17 Q. And what that means is that's the floor, right?

18 A. It's about almost 61,000, and yes, you can be guaranteed
19 the number is higher than that.

20 Q. Okay. Thank you.

21 So back to Dr. Sullivan's representation of those
22 122, he talks about some here --

23 A. And then here he's trying to say, well, gee, you can just
24 see there's -- the values go up and down, but you -- again, the
25 conservative model was meant to kind of take a sledge hammer to

1 my model and do whatever damage we could to it and see, gee,
2 does it still click? Does it still give us similar results?

3 You can see, yes, it lowered the results. These are
4 also unique accounts because these are all accounts with long
5 infringing history. So they're the ones that are the hardest
6 to verify. So we do get this behavior.

7 But the thing that -- again, I'm concerned about
8 Dr. Sullivan's approach, because here he's cherry-picking.
9 We've got 122. This is the only 122 accounts that we actually
10 have data that tells us if they're repeat infringers.

11 So Cox provided the identity of the account holders
12 for the entire period, verified every one of these 122
13 accounts. So what does Dr. Sullivan do? He cherry-picks 25
14 percent of them, shows you those, and says, see, the model is
15 unreliable.

16 But if we could go to the next slide, this is a
17 picture of all of those 122. So you can see 75 percent of the
18 accounts -- the conservative and the revised model, those are
19 all on the right. The results were very close, sometimes, I
20 mean, indistinguishable, and 75 percent of them come up with
21 the same results in terms of verification.

22 And then if we -- I think we can highlight the ones
23 that -- or remove the ones that Dr. Sullivan cherry-picked, and
24 you can see he picked ones that give a very misleading
25 impression about this result. So that to me, the overwhelming

1 evidence is this is a very strong verification of my model
2 results, and instead, Dr. Sullivan is trying to cherry-pick it
3 to say, well, the results are a little erratic, so we don't
4 know.

5 Q. Okay. Dr. Bardwell, I'd like to talk for a few minutes
6 about the 122 accounts that you actually had, all right?

7 THE COURT: You know what? Let's break now for
8 lunch. It sounds like you're moving into something a little
9 bit different.

10 MR. CARACAPPA: Yes. Thank you.

11 THE COURT: So I have a conflict during the
12 lunchtime, so we're going to take a little longer lunch than
13 normal. So we're going to come back at 2:30, and we'll
14 continue testimony at that time, all right?

15 Then you're excused. Enjoy your lunch. Thank you.

16 JURY OUT

17 THE COURT: All right. My apologies for the extra
18 delay. We'll come back at 2:30 and continue testimony.

19 And, of course, you're in the middle of your
20 testimony, so don't discuss what you've testified to so far
21 with anybody. All right, Doctor?

22 THE WITNESS: All right.

23 THE COURT: All right. Thank you.

24 All right. We're in recess.

25 THE WITNESS: Thank you, Your Honor.

1 NOTE: The morning portion of the proceedings on
2 December 15, 2015, are concluded.

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16 We certify that the foregoing is a true and
17 accurate transcription of our stenographic notes.
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19

20 /s/ Norman B. Linnell
Norman B. Linnell, RPR, CM, VCE, FCRR
21

22 /s/ Anneliese J. Thomson
Anneliese J. Thomson, RDR, CRR
23
24
25